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Love, Flirt or Repel: Hybrid global governance of the ILO core labour standards

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Ever since its constitution the ILO has developed and maintained a system of labour standards in order to create decent work all over the world. With the globalisation of the economy multinationals have gained an important position in furthering these labour standards throughout their value chains. From a regulatory point of view this development has resulted in a panoply of law and law-like initiatives within the global space in order to implement the labour standards. Much is already known about these initiatives from an individual and isolated perspective. Yet, little is known about their interactions in the global space. Whereas the concept of global space acknowledges the coexistence of different regulatory forms serving different roles, the concept of hybrid structures acknowledges the fact that these regulations interact in several configurations. The aim of this contribution is to map the main regulatory initiatives, to analyse their different roles in the global space of labour standards and to analyse in which configurations they interact. The findings of this analysis provide a more advanced and comprehensive understanding of the regulation of labour standards on the global level.

I. INTRODUCTION

On the international level the International Labour Organization (ILO) is the main organisation for the regulation of labour issues. Ever since its constitution the ILO has developed and maintained a system of labour standards to promote 'opportunities for women and men to obtain decent and productive work, in conditions of freedom, equity, security and dignity'.¹ Part of this system is the definition and promotion of four core labour standards: 1) freedom of association and the effective recognition of the right to collective bargaining; 2) the elimination of all forms of forced or compulsory labour; 3) the effective abolition of child labour; and 4) the elimination of

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¹ <http://www.ilo.org/global/standards/introduction-to-international-labour-standards/lang--en/index.htm>.

discrimination in respect of employment and occupation.² Since these rights are qualified as 'core' standards, the ILO puts much emphasis on the promotion of these rights. It does so, firstly by identifying the Conventions and Recommendations addressing these topics as fundamental, and as such giving them a higher priority than the other Conventions,³ and secondly by the 1998 Declaration on Fundamental Principles and Rights at work (hereafter the 1998 Declaration), which is also addressed to the Member States. However, since it is a declaration, it is not dependent on whether or not it is ratified by those states.⁴ Thirdly, the ILO promotes these rights in its Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (hereafter the Tripartite Declaration), which lays down guidelines for multinational enterprises, governments, and employers' and workers' organisations in such areas as employment, training, conditions of work and life, and industrial relations.⁵ There are also other international organisations that promote the implementation of these core labour standards (CLSs). The two organisations that are most active in this are the United Nations Global Compact (UN GC)⁶ and the Organisation for Economic Co-operation and Development (OECD)⁷. The UN GC is 'a strategic policy initiative for businesses that are committed to aligning their operations and strategies with ten universally accepted principles in the areas of human rights, labour, environment and anti-corruption'.⁸ In the area of labour, four principles have been identified, which are the four CLSs of the ILO. The OECD promotes the implementation of the ILO's CLSs by its Guidelines for Multinational Enterprises, which are 'far-reaching recommendations addressed by governments to multinational enterprises operating in or from adhering countries' and as such, they 'provide voluntary principles and standards for responsible business conduct in areas such as employment and industrial relations'.⁹ Besides these public international organisations, there are also non-governmental organisations (NGOs) that further the promotion of the ILO CLSs, for instance the Fair Labor Association; the Ethical Trading Initiative; Social Accountability International (or SA8000); the Fair Wear Foundation, etc.¹⁰ The main addressees of these NGOs are Multinational Enterprises or MNEs (and their full global chain). However, in the implementation and monitoring

² ILO Declaration on Fundamental Principles and Rights at Work of 1998.

³ These Conventions are: Convention 87 on the Freedom of Association and Protection of the Right to Organise (1948); Convention 98 on the Right to Organise and Collective Bargaining (1949); Convention 29 on Forced Labour (1930); Convention 105 on the Abolition of Forced Labour (1957); Convention 138 on Minimum Age (1973); Convention 182 on the Worst Forms of Child Labour (1999); Convention 100 on Equal Remuneration (1951); and Convention 111 on Discrimination in Employment and Occupation (1958).

⁴ For a discussion about what this might mean for the status of fundamental social rights as fundamental human rights, see P. Alston, "'Core Labour Standards" and the Transformation of the International Labour Rights Regime', (2004) 15 *European Journal of International Law* 3, 457-521; B. A. Langille, 'Core Labour Rights – The True Story (Reply to Alston)', (2005) 16 *European Journal of International Law* 3, 409-437; F. Maupain, 'Revitalization not Retreat. The Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers' Rights', (2005) 16 *European Journal of International Rights* 3, 439-465; and P. Alston, 'Facing Up the Complexities of the ILO's Core Labour Standards Agenda', (2005) 16 *European Journal of International Law* 3, 467-480.

⁵ Introduction to the Tripartite Declaration, available at http://www.ilo.org/emment/Publications/WCMS_094386/lang-en/index.htm.

⁶ UN Global Compact, available at <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html>.

⁷ 'OECD Guidelines for Multinational Enterprises', 37, paragraph 48.

⁸ <http://www.unglobalcompact.org/AboutTheGC/index.html>.

⁹ <http://www.oecd.org/daf/inv/mne/>.

¹⁰ <http://www.fairlabor.org/our-work/labor-standards>; <http://www.ethicaltrade.org/resources/key-eti-resources/eti-base-code>; <http://www.sa-intl.org/index.cfm?fuseaction=Page.ViewPage&>

of compliance other actors are involved as well, often including workers' representatives. Lastly, on the global level, ILO CLSs are also promoted by MNEs themselves. This is either done by unilaterally adopted codes of conduct that are part of the MNEs' corporate social responsibility strategies (CSRs) or via bilateral international framework agreements that have been concluded between the management of an MNE on the one side and workers' organisations on the other side, among which Global Union Federations, World Works Councils and European Works Councils^{11, 12}.

Research on each of these regulatory forms is extensive and thorough and provides interesting insights.¹³ Nevertheless, hardly any of this research discusses these forms in relation to each other.¹⁴ This is quite remarkable when considering this in the

pageId=1458; <http://www.fairwear.org/488/labour-standards/1.-employment-is-freely-chosen/>. This is just a small selection from many others.

¹¹ About this, see in general: I. Schömann, A. Sobczak, E. Voss & P. Wilke, *Codes of conduct and international framework agreements: New forms of governance at company level* (European Foundation for the Improvement of Living and Working Conditions, Luxembourg, 2008).

¹² There are more regulatory forms on the global level, for instance social clauses in trade agreements and labour standards in subcontracting, however, these are not part of the mainstream literature on the promotion and implementation of the ILO CLS. Since this contribution aims to connect with the mainstream literature, these forms are excluded. See on these forms: M.-A. Moreau, *Normes sociale, droit du travail et mondialisation* (Daloz, Paris, 2006), 190-208; and G. Williams, S. Davies & C. Chinguno, 'Subcontracting and Labour Standards: Reassessing the Potential of International Framework Agreements', (2013) *British Journal of Industrial Relations*, early online publication of 5.03.2013.

¹³ Just a selection from many: on the ILO Conventions: J.-M. Servais, *International Employment and Labour Law* (ILO, Geneva, 2011); and L. Betten, *International Labour Law – Selected Issues* (Kluwer, Deventer, 1993). See on the initiatives of other international organisations: Y. Kryvoi, 'Enforcing Labor Rights against Multinational Corporate Groups in Europe', (2007) 46 *Industrial Relations* 2; P.P. Miretski & S.-D. Bachmann, 'The UN "Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with regard to Human Rights": A Requiem', (2012) 17 *Deakin Law Review* 1, 5-41; and J. G. Ruggie, *Just Business. Multinational Corporations and Human Rights* (Norton, London, 2013). See on the initiatives of non-governmental organisations: I. Daugaireilh, 'La norme ISO 26000 sur la responsabilité sociétale des organisations: observations sur une expérience d'inter-normativité', in M. Capron, F. Quairel-Lanoizelée & M. F. Turcotte (eds), *ISO 26000: une Norme 'hors norme'* (Economica, Paris, 2010), 147-163; S. Barrientos & S. Smith, 'Do workers benefit from ethical trade? Assessing codes of labour practice in global production systems', (2007) 28 *Third World Quarterly* 4, 713-729; and F. Cafaggi, 'New Foundations of Transnational Private Regulation', (2011) 38 *Journal of Law and Society* 1, 20-49. On CSR Codes of Conduct, see R. Jenkins, R. Pearson & G. Seyfan (eds), *Corporate Responsibility and Labour Rights. Codes of Conduct in the Global Economy* (Earthscan, London, 2002); and F. J. L. Pennings, Y. Konijn & A. G. Veldman, *Social responsibility in labour relations – European and Comparative perspectives* (Kluwer Law International, Alphen aan den Rijn, 2008). See on IFAs: K. Papadakis (ed), *Cross-border Social Dialogue and Agreements: An emerging global industrial relations framework?* (ILO, Geneva, 2008); and N. Hammer, 'International Framework Agreements: global industrial relations between rights and bargaining', (2005) 11 *Transfer: European Review of Labour and Research* 4, 511-530.

¹⁴ There are some scholars that do address more than one initiative, however mostly descriptive as also existent, without making a connection between the initiatives, eg M.-A. Moreau, *Normes sociales, droit du travail et mondialisation. Confrontations et mutations* (Daloz, Paris, 2006); R. Jenkins, R. Pearson & G. Seyfan (eds), *Corporate Responsibility and Labour Rights. Codes of Conduct in the Global Economy* (Earthscan, London, 2002); B. Hepple, *Labour Laws and Global Trade* (Hart Publishers, London, 2005); and B. Bercusson & C. Estlund (eds), *Regulating Labour in the Wake of Globalization: New Challenges, New Institutions* (Hart Publishing, London, 2008). Also, some of them are limited in their scope of initiatives, since they only address public initiatives or private initiatives. An example of the former is L. Betten, *International Labour Law. Selected Issues* (Kluwer, Deventer, 1993), who not only deals with the Conventions of the ILO, but also with initiatives of regional organisations, like the European Union. An example of the latter is a 2008 Eurofound report: I. Schömann, A.

context of the doctrine on hybrid structures between hard law and soft law,¹⁵ and more broadly in the arena of transnational governance that is also referred to as 'global space',¹⁶ or more specifically in the context of labour law, as 'hybrid global labour law'.¹⁷ Basic to both doctrines is the recognition that traditional forms of regulation by law coexist with other forms of regulation that are law-like, yet different in (legal) nature and regulatory dynamics. With traditional forms of regulation is understood the law of public organisations that stress enforcement and compliance with fixed norms.¹⁸ Law-like forms of regulation are understood to mean regulatory initiatives of (multi-stakeholder) private organisations, including NGOs, MNEs and trade unions, that put emphasis on collective problem-solving in complex situations with rather open-ended standards.¹⁹ In general these two regulatory forms are associated with two roles in global space: rule orientation and problem-solving, respectively.²⁰ Furthermore, these two broad forms of regulation do not just coexist. On the contrary, they serve different roles in the 'global space' and interact in a wide variety of configurations.²¹ The type of configuration between the regulatory forms determines how the roles fit together, ie whether they downplay each other or play to each other's strengths. The doctrine on hybrid structures distinguishes three main configurations: rivalry – when the different initiatives fight for dominance; complementarity – when the different initiatives coexist peacefully, either by unplanned design or by well-elaborated design; transformativity – when the different initiatives merge and each constituent part is needed to achieve the goal.²² What these doctrines together implicate is that in order to grasp the full extent of what is happening on the global space a wider approach needs to be taken to law, focusing on all regulatory (law-like) forms and their distinguished roles. Furthermore, these regulatory forms need to be studied in relation to each other, since their configuration determines to what extent these regulatory forms

Sobczak, E. Voss & P. Wilke, *Codes of conduct and international framework agreements: New forms of governance at company level* (European Foundation for the Improvement of Living and Working Conditions, Luxembourg, 2008).

¹⁵ A doctrine that has been introduced in the debate on 'new governance' and is most elaborately developed by D. M. Trubek & L. G. Trubek, 'New Governance and Legal Regulation: Complementarity, Rivalry or Transformation', (2007) 13 *Columbian Journal of European Law* 3, 539 – 564.

¹⁶ About this, see M. P. Cottrell & D. M. Trubek, 'Law as Problem Solving: Standards, Networks, Experimentation, and Deliberation in Global Space', (2012) 21 *Transnational Law & Contemporary Problems*, 359–393.

¹⁷ U. Mückenberger, 'Hybrid Global Labour Law', in R. Blanpain & F. Hendrickx (eds), *Labour Law between Change and Tradition – Liber Amicorum Antoine Jacobs* (Wolters Kluwer, Alphen aan den Rijn, 2011), 99–116.

¹⁸ M. P. Cottrell & D. M. Trubek, 'Law as Problem Solving: Standards, Networks, Experimentation, and Deliberation in Global Space', *op cit*, 359, note 15.

¹⁹ *Ibid.* About this in the context of 'new governance' see also: G. De Búrca & J. Scott, 'Introduction', in G. De Búrca & J. Scott (eds), *Law and New Governance in the EU and the US* (Hart Publishing, Portland, 2006), 6.

²⁰ M. P. Cottrell & D. M. Trubek, 'Law as Problem Solving: Standards, Networks, Experimentation, and Deliberation in Global Space', *op cit*, 361, note 15, where they draw on the work of trade law scholar Robert E. Hudec.

²¹ M. P. Cottrell & D. M. Trubek, 'Law as Problem Solving: Standards, Networks, Experimentation, and Deliberation in Global Space', *op cit*, note 15; and D. M. Trubek and L. G. Trubek, 'New Governance and Legal Regulation: Complementarity, Rivalry or Transformation', *op cit*, note 14.

²² D. M. Trubek and L. G. Trubek, 'New Governance and Legal Regulation: Complementarity, Rivalry or Transformation', *op cit*, note 14.

are able to play their distinguished roles.²³ Moreover, together these doctrines imply that a subject is best regulated when the several regulatory forms employ both roles (rule-setting and problem-solving) and when this is done in a hybrid configuration where they consciously interact, either in a transformative configuration (love) or in a complementary configuration (flirt), whereas this could become futile when they interact as rivals (repel).

The aim of this contribution is to gain a better understanding of the hybrid global space by which the core labour standards of the ILO are promoted, in particular in the cross-border situation of labour, ie the activities of MNEs. Therefore, section two starts with more elaborate descriptions of the doctrine on global space, in particular with regard to the two roles and the governance mechanisms that are associated with those roles, and the doctrine on hybrid structures. When these two doctrines are taken together, it gives an impression of how the hybrid global space is shaped. The initiatives identified in this introduction will be analysed against the background of these two doctrines, thus for their role in the global space and the governance mechanism deployed by the respective initiatives and their possible configurations in this global space. This is firstly done for the public initiatives (section 3) and secondly for the private initiatives (section 4). In section 5, the findings of those two sections are brought together in order to sketch the hybrid global space that governs the promotion of the implementation of the ILO CLSs by MNEs.

II. THE DOCTRINE ON GLOBAL SPACE AND THE DOCTRINE ON HYBRID STRUCTURES

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In the introduction it is outlined that the ILO CLSs are, on the global level, not only promoted by the Conventions of the ILO itself, but by a panoply of regulatory forms, varying from traditional laws to law-like instruments. On a very nuanced and detailed level, the variety of regulatory forms is probably infinite. Therefore, the identification of regulatory forms in this contribution is confined to the most prominent forms. These are: the ILO Conventions; law-like instruments of public organisations (the 1998 Declaration; the Tripartite Declaration; the guidelines of the OECD and the UN Global Compact programme); law-like initiatives of non-governmental organisations (eg the Fair Labor Association; the Fair Wear Foundation; the Ethical Trade Initiative; ISO 26000 and SA8000); and the self-regulatory initiatives of MNEs – unilateral initiatives (CSR codes of conduct) and bi/multilateral initiatives (international framework agreements (IFAs)). Together these regulatory initiatives comprise what is referred to as the ‘global space’. In order to grasp the full extent of these regulatory initiatives with respect to the ILO CLSs, it is necessary to identify first their distinguished regulatory roles and governance mechanisms and, secondly, since they coexist in the same space, their configurations. The doctrine on global space offers insights to identify the role and governance mechanisms, while the doctrine on hybrid structures maps three basic configurations. Both doctrines together give an impression of the regulatory ‘hybrid global space’ of the ILO CLSs.

A. Doctrine on global space

Cottrell and Trubek use the term ‘global space’ to refer to ‘an evolving regulatory environment created by both globalization and the increasing role international norms

²³ For a similar conclusion in the context of transnational private regulation, see F. Cafaggi, ‘New Foundations of Transnational Private Regulation’, *op cit*, note 11.

play in domestic settings'.²⁴ Based on a literature review, they come to at least four defining features of this space: first, global space is increasingly diverse and complex since law has to bring some degree of uniformity between a great variation of social systems and legal orders; secondly, the regulatory arena is plural in terms of legal orders (horizontal and vertical) and in terms of participating actors (public and private); thirdly, it is recognised that international systems of coercion are relatively weak and limited in means; and fourthly, a knowledge deficit that is the result of a high degree of uncertainty concerning the optimal solutions to problems.²⁵ These features have resulted in the development of the global space, comprising two main roles: the conventional rule-setting role of international law that stresses the enforcement and compliance with fixed rules, and a problem-solving role that emphasises the operation of multi-level networks, the role of experimentation and deliberation in order to internalise open-ended standards.²⁶

What these two distinctive roles (rule-setting and problem-solving) characterises is drawn from the literature on legalisation²⁷ and new governance.²⁸ The concept of legalisation reflects traditional, legalist ideas on international public law: law as a system of precise rules that are adopted according to a procedure and that are interpreted and enforced by third-party decision makers.²⁹ Furthermore, it makes the implicit assumption that greater degrees of lawfulness, substance, and structure³⁰ 'will lead to more compliance and hence greater cooperative gains'.³¹ Although this may not always be the case,³² it represents the core governance mechanisms of the first role – rule-setting – of law-like processes that comprise the global space.

The second role of law-like processes that comprise the global space – problem-solving – involves 'a common understanding that a problem exists, consensus that it ought to be solved, and the mobilization of appropriate expertise and resources to do so'.³³ In order to achieve this, some governance mechanisms must be created. Firstly,

²⁴ M. P. Cottrell & D. M. Trubek, 'Law as Problem Solving: Standards, Networks, Experimentation, and Deliberation in Global Space', *op cit*, 362, note 15.

²⁵ *Ibid*, 362-363.

²⁶ *Ibid*, 362. In his search of hybrid global labour law, Mückenberger comes to a more or less similar conclusion when he says: 'Public legal regulations are either non-existent in the global sphere or their enforcement power is more or less totally missing. [...] Any expectation for a global labour law can therefore not rely on that public angle. As against that, private ordering exist on a global level and its power seems substantial', U. Mückenberger, 'Hybrid Global Labour Law', *op cit*, 109, note 16.

²⁷ K. W. Abbott, R. O. Keohane, A. Moravcsik, A.-M. Slaughter & D. Snidal, 'The concept of legalization', (2000) 54 *International Organization* 3, 401-419. See for a further developed concept: B. P. ter Haar, 'Open Method of Coordination. An analysis of its meaning for the development of a social Europe', Dissertation University of Leiden, MI 271, 53-57.

²⁸ D. M. Trubek & L. G. Trubek, 'Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Coordination', (2005) 11 *European Law Journal* 3, 343-364; and more generally G. de Búrca & J. Scott (eds), *Law and Governance in the EU and the US* (Hart Publishing, Oxford, 2006).

²⁹ M. P. Cottrell & D. M. Trubek, 'Law as Problem Solving: Standards, Networks, Experimentation, and Deliberation in Global Space', *op cit*, 364, note 15; K. W. Abbott *et al*, 'The concept of legalization', *op cit*, note 26.

³⁰ B. P. ter Haar, 'Open Method of Coordination. An analysis of its meaning for the development of a social Europe', *op cit*, 54, note 26.

³¹ M. P. Cottrell & D. M. Trubek, 'Law as Problem Solving: Standards, Networks, Experimentation, and Deliberation in Global Space', *op cit*, 364, note 15; and M. Kahler, 'The Causes and Consequences of Legalization', (2000) 54 *International Organization* 3, 661-683.

³² M. P. Cottrell & D. M. Trubek, 'Law as Problem Solving: Standards, Networks, Experimentation, and Deliberation in Global Space', *op cit*, 365, note 15.

³³ *Ibid*, 367.

mechanisms are to be deployed that 'seek to promote experimentation and knowledge dissemination'.³⁴ Secondly, these mechanisms must create participation, not only because stakeholders have the knowledge (and resources) to solve the problems, but also because their involvement generates procedural and substantive legitimacy. Thirdly, they should have the ability to translate knowledge into norms.³⁵ Related to these three governance mechanisms, Cottrell and Trubek identify five features characterising the role of problem-solving. The first feature is 'the emphasis on broad and open-ended standards whose full meaning and impact must be worked out through multi-level, deliberative and probably consensual means'.³⁶ The second feature is that of experimentation. Because of the complexities and uncertainties, the governance mechanism creates an iterative process that promotes the exchange of best practices and renders standards revisable.³⁷ The latter – revisable standards – implies the third feature, namely that the law-like process needs to accommodate deliberation and negotiation. The fourth characteristic feature is that there is not one source of law (lawmaker), hence there are multiple actors that cooperate and coordinate their actions vertically and horizontally in a multi-level governance setting, involving public officials, private actors and epistemic communities.³⁸ The fifth characteristic Cottrell and Trubek have identified of this expanded vision of the law of global space is the fact that both roles – rule-setting and problem-solving – are often yoked together in hybrid constellations.³⁹ What these constellations can be, will be further described in the next section on the doctrine of hybrid structures.

B. Doctrine on hybrid structures

While the concept of global space recognises that 'all legal sources in the world have their particular means and procedures of implementation and enforcement', the theory of hybrid structures takes this one step further and argues that sources that operate at the same time and contribute to a common goal, act 'in a multi-fold interplay of public and private actors in the processes of norm-building and norm-implementing'.⁴⁰ With this it is recognised that a significant development has taken place. The doctrine of hybrid structures aims to help understand this process. Therefore it maps several basic configurations between law and law-like processes; between traditional command and control processes and forms of new governance; and between hard law and soft law. Essentially, three varieties of hybrid configurations are distinguished:

³⁴ Ibid.

³⁵ Ibid.

³⁶ Ibid, 368.

³⁷ Ibid, 368-369. See also J. Zeitlin, 'Pragmatic Transnationalism: Governance Across Borders in the Global Economy', (2011) 9 *Socio-Economic Review*, 187-206.

³⁸ Ibid, 369. See also D. Drezner, *All Politics is Global: Explaining International Regulatory Regimes* (Princeton University Press, New Jersey, 2009). See in general about multi-level governance: D. Messner, 'The Concept of the "World Economic Triangle": Global Governance Patterns and Options for Regions', IDS Working Paper 173, 2002; G. Marks & L. Hooghe, 'Contrasting visions of multi-level governance', in I. Bache & M. Flinders (eds), *Multi-Level Governance* (Oxford University Press, Oxford, 2004), 15-30; and with respect to transnational industrial relations: M. Keune & P. Margison, 'Transnational Industrial Relations as Multi-Level Governance: Interdependencies in European Social Dialogue', (2012) *British Journal of Industrial Relations*.

³⁹ M. P. Cottrell & D. M. Trubek, 'Law as Problem Solving: Standards, Networks, Experimentation, and Deliberation in Global Space', *op cit*, 371, note 15.

⁴⁰ U. Mückenberger, 'Hybrid Global Labour Law', *op cit*, 113, note 16.

‘When each [system] is operating at the same time and contributing to a common objective but they have not merged, we describe them as *complementary*. When the newer forms of governance are designed to perform the same tasks as legal regulation and are thought to do it better, or otherwise there seems to be a necessary choice between systems, we speak of *rivalry* between the co-existing processes.’⁴¹

The third variety, *transformation*, is used to

‘describe configurations in which governance and traditional law are not only complementary; they are integrated into a single system and the functioning of each element is necessary for the successful operation of the other’.⁴²

Whereas complementarity speaks for itself, the other two varieties need further explanation. The variety *rivalry* knows three configurations. The first configuration of rivalry is when traditional regulation and governance are alternative routes of equal value. They show no interaction with each other since the choice is either the one or the other. The potential threat lies in the fact that one of the processes can become more popular than the other and consequently suppress the other.⁴³ When this occurs consciously this form of rivalry formed by the implication that one form of regulation, in particular governance, is superior over the other and is therefore preferred.⁴⁴ Thirdly, rivalry can exist when the traditional form of regulation creates unacceptable standards that can be avoided by a governance process. Particularly this refers to the situation in which traditional law is unable to frame workable solutions as a result of which stakeholders are forced to seek ways out of the regulatory vice.⁴⁵

The variety *transformation* is divided into three sub-varieties as well. In the first variety, law creates new governance procedures and mandates basic parameters. This is also indicated as a shift to ‘proceduralism’ in legal regulation: law structures procedures for problem-solving while the norms are entrenched in the reflexive practice of governance.⁴⁶ The second variety of transformation is formed when ‘new governance solves the problems and law provides a safety net’.⁴⁷ Law, for instance, might create minimal standards while governance is available for those who exceed the standards. This variety is also indicated as default hybridity.⁴⁸ The law thus allows stakeholders ‘to “opt out” of the legal regime on condition that they use new governance processes such as self-regulation and self-monitoring to exceed minimum standards’.⁴⁹ Thirdly, transfor-

⁴¹ D. M. Trubek & L. G. Trubek, ‘New Governance and Legal Regulation: Complementarity, Rivalry or Transformation’, *op cit*, 543-544, note 15.

⁴² *Ibid.*

⁴³ *Ibid.*, 547-548.

⁴⁴ *Ibid.*, 548-549.

⁴⁵ *Ibid.*, 12. See also: C. Sabel & J. Zeitlin, ‘Learning from Difference: The New Architecture of Experimentalist Governance in the European Union’, Paper prepared for presentation at the ARENA seminar, Centre for European Studies, University of Oslo, 2006, available at <http://www2.law.columbia.edu/sabel/papers/EU%20governance%20paper%20060406.pdf>.

⁴⁶ *Ibid.*, 12-13. Where they draw on the work of Gunter Teubner: G. Teubner, ‘Substantive and Reflexive elements in Modern Law’, (1983) 17 *Law & Society Review*, 286; and G. Teubner, ‘The King’s Many Bodies: The Self-Deconstruction of Law’s Hierarchy’, (1997) 31 *Law & Society Review*, 788. They derive this variety also from the case study of J. Scott & J. Holder, ‘Law and New Environmental Governance in the European Union’, in G. De Búrca & J. Scott (eds), *Law and New Governance in the EU and the US* (Hart Publishing, Oxford, 2006), 211-242.

⁴⁷ *Ibid.*, 13.

⁴⁸ G. De Búrca & J. Scott (eds), *Law and New Governance in the EU and the US*, *op cit*, 9.

⁴⁹ D. M. Trubek & L. G. Trubek, ‘New Governance and Legal Regulation: Complementarity, Rivalry or Transformation’, *op cit*, 550, note 15.

mation comes in the variety where traditional regulation (hard law) provides general norms while governance is used to make them more concrete.⁵⁰ Furthermore, Trubek and Trubek note that hybrid structures can be designed consciously in order to get the best of all regulatory forms involved. Hybrid structures can also gradually grow into a complementary structure or merge in a new constellation. Sometimes this is done intentionally to displace older forms of regulation; however, it can also occur unintentionally because the newer form makes it hard to deploy traditional modes that then wither away. In such a constellation the newer and older forms coexist as rivals.⁵¹

These configurations seem simple; yet, the identification thereof is not, in particular when more than two regulatory forms are involved. Moreover, for a full analysis of the configurations, in-depth qualitative research is needed, including empirical research, such as interviews.⁵² In this paper the analysis is limited to what is found in the regulatory initiatives. More specifically, the analysis is conducted as follows. One of the aims of the paper is to map the hybrid global structure of regulatory forms that coexist in the field of the core labour standards of the ILO. Therefore, configurations are sought with the ILO as the primary organisation to regulate labour rights on the global level. In this context, three initiatives of the ILO are of interest: the eight Conventions dealing with the core labour rights; the 1998 Declaration; and the Tripartite Declaration. To establish what kind of configuration is made with one or more of these initiatives, several aspects of the other initiatives have been analysed. First, they have been analysed with regard to their content, ie which CLS they address. Secondly, it has been analysed whether the initiatives provide for their own definition of those CLSs, or whether they refer to another initiative. Thirdly, when the latter is the case, it is further analysed which initiative reference is made to. It is likely that this will be one of the initiatives of the ILO. Nevertheless, it is imaginable that reference is made to, for instance, the standards of the OECD, the UN Global Compact or NGOs, which in turn might refer to an initiative of the ILO. Consequently, the hybrid configuration can exist of several shackles.

The aim of this approach is to determine whether the regulatory forms of global CLSs recognise the ILO as a principal initiative or not, and if not, whether or not an indirect configuration is formed which will most likely be via another initiative. When the analysed initiative makes no reference to another regulatory form and uses its own definitions, it is considered a rival to the ILO initiatives. When the analysed initiative recognises the ILO, directly or indirectly, the text is analysed examining whether the recognition is limited to only a reference to the ILO, or that it is intended to create a stronger configuration. Signs of a stronger configuration are for instance found when the initiative refers to several initiatives of the ILO or to implementation mechanisms available at the ILO, for example the ILO Helpdesk for Business on International Labour Standards.⁵³ To what extent this configuration is consciously constructed, is determined

⁵⁰ Ibid. See also F. Cafaggi, 'New Foundations of Transnational Private Regulation', *op cit*, 40-41, note 14.

⁵¹ Ibid.

⁵² Research on IFAs has for instance shown that not all regulatory mechanisms are included in the IFA itself. Therefore, an analysis based on only the texts of these initiatives is limited as it does not take into account the practice around the initiative. Cf C. Welz, 'A Qualitative Analysis of International Framework Agreements: Implementation and Impact', and D. Stevis, 'The Impacts of International Framework Agreements: Lessons from the Daimler case', both in K. Papadakis (ed), *Shaping Global Industrial Relations. The Impact of International Framework Agreements* (ILO/Palgrave, Geneva, 2011), 38-60 and 116-142, respectively.

⁵³ <http://www.ilo.org/empent/areas/business-helpdesk/lang--en/index.htm>.

based on the reasons for the adoption of the initiative for as far as these are traceable. When these cannot be traced for the particular initiative or when the analysis is of a more general nature (which will be the case for CSR Codes of Conduct and IFAs), secondary sources will be used, mainly literature about these initiatives.

C. Other methodological issues

Impressionistic analysis

For a good and comprehensive understanding of the hybrid global space of the ILO CLSs in-depth analyses are needed. Such exceeds the possibility of this single article and is to be left for further research in a bigger research project.⁵⁴ Instead, the aim of this contribution is to give a first impression of the hybrid global space by an impressionistic analysis of the core regulatory initiatives. It intends to give an impression of the type of roles (rule-setting or problem-solving) the different initiatives serve and how they interact with respect to the implementation of the fundamental social rights that form the ILO's core labour standards. This impressionistic analysis has several consequences, three of which are to be particularly noted. Firstly the number of regulatory initiatives is limited to the main initiatives and where necessary to a selection (which is the case for NGOs and CSR codes of conduct). Secondly, the analysis itself is limited to these initiatives, whereas sometimes many more initiatives/programmes are involved. If this is the case, such is indicated in a footnote. Thirdly, for a full analysis it would be necessary to separately analyse the fundamental rights involved, since it is known that some of them are more often addressed than others, which is in particular so for forced labour and child labour.

A selection of initiatives

The initiatives of public international organisations are limited in number, which makes it possible to focus on the most dominant ones: ILO Conventions, the 1998 Declaration, the Tripartite Declaration, the OECD Guidelines and the UN Global Compact, including the Ruggie framework. These are different from the private initiatives, in particular those by non-governmental organisations and those that are part of an MNE's CSR policy. Some estimates indicate over 7,000 initiatives.⁵⁵ There is a good knowledge of the number of international framework agreements (IFAs), but this number is growing.⁵⁶ In essence, for all these initiatives it is to be considered which ones are included in the analysis and which ones are not. This consideration differs per type of initiative.

The number of NGOs that deal with labour rights is unknown. However, when searching the internet for this kind of NGOs, several things stand out, some of which are

⁵⁴ As such, this contribution is to be considered a pre-study for a bigger research project that is being developed by the author.

⁵⁵ www.csrhub.com for instance rates over 7,000 CSR policies and strategies.

⁵⁶ In 1988 the first IFA was signed, another 23 have been signed between 1988 and 2002, and in the following four years another 33. By mid-2010 there were about 80 IFAs in total. This is the number of IFAs involving a GUF; however, when a wider definition is taken, approximately 160 initiatives exist. About this, see K. Papadakis, 'Introduction and Overview', in K. Papadakis (ed.), *Shaping Global Industrial Relations. The Impact of International Framework Agreements* (ILO/Palgrave, Geneva, 2011), 1-18 (in particular at 5).

helpful to make a representative selection. Firstly, certain NGOs address human rights in general, which include (some) labour rights,⁵⁷ whereas other NGOs address labour rights specifically.⁵⁸ For the latter, a further distinction can be made between NGOs that aim to further the implementation of labour rights no matter what kind of business the company is active in,⁵⁹ and NGOs that target a specific sector.⁶⁰ Another selection criteria is distinguishing between NGOs that have a national focus and those that focus on MNEs and their supply chain. The interest of this paper lies with the latter, yet not with any of the other distinctions. Therefore a random sample is taken from each of these three categories.⁶¹ More specifically, the initiatives of Human Rights Watch, the Ethical Trading Initiative, SA8000, the Fair Labor Association and the Fair Wear Foundation will be analysed.

With respect to CSR codes of conduct, the number, exceeding 7,000, is by far too high for the qualitative document analysis that is aimed for in this paper. Instead the analysis relies on secondary sources (literature) and a sample of about twenty CSR policies that are rated the best at csrhub.com. To select this sample two criteria are used: sectoral⁶² and geographical⁶³ spread. These criteria are based on, firstly, comments that these kind of initiatives are a 'hobby of the West' and, secondly, empirical findings that in some sectors CSR policies are more developed than in others.

Unlike the other two private initiatives, there is a good overview of the number of IFAs. Also, some quantitative data is available, including for instance an analysis of the substantive provisions of IFAs, in particular concerning references to ILO Conventions⁶⁴ and other regulatory forms, among which the 1998 Declaration, the Tripartite Declaration, the OECD Guidelines, the UN Global Compact, and SA8000.⁶⁵ Secondly, there are some interesting case studies on implementation and compliance mechanisms

⁵⁷ About this, see, among others M. Winston, 'NGO Strategies for Promoting Corporate Social Responsibility', (2002) 16 *Ethics and International Affairs* 2, 71-87. Examples of general human rights organisations also dealing with fundamental social rights are: Amnesty International and Human Rights Watch.

⁵⁸ Among many others: SA 8000 (<http://www.sa-intl.org/index.cfm?fuseaction=Page.ViewPage&PageID=1458>); ISO 26000 (<http://www.iso.org/iso/home/standards/iso26000.htm>); the Ethical Trading Initiative (ETI) (<http://www.ethicaltrade.org/>); and the Fair Labor Association (<http://www.fairlabor.org/>).

⁵⁹ Ibid.

⁶⁰ <http://www.fairwear.org/10/home/>.

⁶¹ For another categorisation of NGOs, see R. Jenkins, 'The political economy of codes of conduct', in R. Jenkins, R. Pearson & G. Seyfan (eds), *Corporate Responsibility and Labour Rights. Codes of Conduct in the Global Economy* (Earthscan, London, 2002), 13-42 (at 14-15).

⁶² For the sectoral division, the divisions of the Global Union Federations are taken as a guidance. However, since there are currently eleven, this would scatter the sample too much. Hence, the five most active ones were selected: BWI; Industriall; UNI; IUF and PSI. These are active in the following sectors, respectively: building, building materials, wood, forestry and related areas of work; mining, energy and manufacturing sectors; skills and services; food, agriculture, hotel, restaurant, catering, and tobacco; and public services. More elaborately on GUFs, see <http://www.global-unions.org/about-us.html>.

⁶³ Europe (including the Russian Federation); Africa; Asia/the Pacific; Latin America; and North America/Canada.

⁶⁴ K. Papadakis (ed), *Shaping Global Industrial Relations. The Impact of International Framework Agreements* (ILO/Palgrave, Geneva, 2011), Appendix: Provisions in IFAs, Table 2 (249-256).

⁶⁵ Ibid, Table 3 (257-258).

applied in IFAs.⁶⁶ Since this information enables a more balanced analysis, the analysis is limited to the 80 IFAs that are identified in these studies.⁶⁷

III. GOVERNANCE MECHANISMS AND HYBRIDITY OF PUBLIC REGULATORY INITIATIVES

As indicated in the above section, there is a whole panoply of initiatives that aim to regulate and promote the ILO CLSs. The aim of this section is to analyse the main initiatives of public international organisations, including the ILO itself, the United Nations, in particular the Global Compact programme, and the OECD. Each subsection starts with a brief description of what the initiative aims at, and is followed by an analysis of the regulatory mechanism it therefore uses, in order to identify what role the initiative fulfils within the global space of the ILO CLSs: rule-setting or problem-solving. Lastly, the initiatives are analysed with regard to their hybrid configuration, in particular with the initiatives of the ILO, as explained in section two above.

A. Regulatory initiatives by the ILO

The ILO itself applies an array of regulatory initiatives to further the implementation and application of the core labour standards. The cornerstones of these initiatives are the Conventions that have been labelled as fundamental or core Conventions. In general the core Conventions lay down the basic rights that need to be implemented by the ratifying countries. Most of the core Conventions are supplemented by a Recommendation which holds more detailed guidelines on how the rights of the Conventions are to be implemented.⁶⁸ In essence the main principle of the ILO is simple: the norms of the ratified Conventions and supplementing Recommendations are to be implemented and complied with.⁶⁹ To monitor this the ILO has developed a rather sophisticated supervisory system comprised of several complementary elements.⁷⁰ As summarised by Swepston, the purpose of this monitoring system is

‘not simply to find “violations” and order that they be corrected, though this element does figure among the ILO’s possibilities. It is rather to discover through regular and sustained supervision where states have failed to implement standards fully, and to work together for their implementation. To this end, all ILO technical assistance is geared to the implementation of ILO standards, and all suggestions by its supervisory bodies for improvements in national situations are backed up by offers of assistance to help in doing so.’⁷¹

⁶⁶ Eg C. Welz, ‘A Qualitative Analysis of International Framework Agreements: Implementation and Impact’, *op cit*; and D. Stevis, ‘The Impacts of International Framework Agreements: Lessons from the Daimler case’, *op cit*.

⁶⁷ Which covers about 80 % of all currently signed IFAs, ie 104. For a list of all IFAs, see <http://www.global-unions.org/framework-agreements.html>.

⁶⁸ For instance Conventions 29 and 105, concerning forced labour and the abolition of forced labour, respectively, are complemented by Recommendation 36 concerning forced labour (regulation). For a comprehensive overview, see <http://www.ilo.org/dyn/normlex/en/f?p=1000:12030:0::NO::>.

⁶⁹ L. Swepston, ‘Supervision of ILO Standards’, (1997) 13 *International Journal of Comparative Labour Law and Industrial Relations* 4, 327.

⁷⁰ J.-M. Servais, *International Employment and Labour Law*, *op cit*, 291.

⁷¹ L. Swepston, ‘Supervision of ILO Standards’, *op cit*, 327.

Although it goes beyond the scope of this article to describe this sophisticated system into more detail, it is clear from this indicative description that the supervisory mechanisms that are backing up the Conventions are not limited to traditional command and control, although this is also part of it. Hence, they are complemented with problem-solving mechanisms.⁷²

The second instrument of the ILO that deals with the CLSs is the 1998 Declaration on Fundamental Principles and Rights at Work. The 1998 Declaration 'is an expression of commitment by governments, employers' and workers' organizations to uphold basic human values – values that are vital to our social and economic lives'.⁷³ Indeed, as argued by N'Diaye, the 1998 Declaration commits all the Member States by the mere fact of membership of the ILO.⁷⁴ Conversely, the ILO has an obligation to assist its members in their established and expressed needs in order to attain the Declaration's objectives. This assistance is in particular provided by advisory services and support, by setting up priorities and plans for technical cooperation, by mobilising internal and external resources and by encouraging other development partners to contribute to this process.⁷⁵ How this is to be done is further elaborated in the Follow-up to the Declaration, which is designed as complementary to the established supervisory system on the ratified Conventions.⁷⁶ It is comprised of two elements: the Annual Review by the ILO Declaration Expert-Advisors (IDEA); and the Global Reports by the ILO Director-General, in conjunction with technical cooperation identification and activities to create a momentum for economic and social development.⁷⁷ The purpose of the annual Global Reports is to provide 'a worldwide dynamic picture that highlights trends and current development in the realization of one of three fundamental principles and rights at work'.⁷⁸ Based on these reports priorities are identified and action plans for technical cooperation are drawn up.

The purpose of the Annual Review is 'to provide a yearly opportunity to examine the efforts made in accordance with the Declaration by Members which have not yet ratified all the fundamental Conventions'.⁷⁹ Expert advisors assess the reports with regard to difficulties encountered by the reporting countries in achieving the principles and rights, and make comments and recommendations that are to be further discussed between the ILO Governing Body and the countries involved. This has allowed the ILO

⁷² For elaborate descriptions of the supervisory mechanisms of the ILO, see L. Sweptson, 'Supervision of ILO Standards', *op cit*; J.-C. Javillier & B. Gernigon (eds), *Les normes internationales du travail: un patrimoine pour l'avenir. Mélanges en l'honneur de Nicolas Valticos* (ILO, Geneva, 2004), in particular the contributions in Part I: The Supervisory System.

⁷³ <http://www.ilo.org/declaration/lang--en/index.htm>.

⁷⁴ M. N'Diaye, 'The Annual Review and the promotion of the 1998 ILO Declaration on Fundamental Principles and Rights at Work: Developments and initial impact assessment', in J.-C. Javillier & B. Gernigon, *Les normes internationales du travail: un patrimoine pour l'avenir. Mélanges en l'honneur de Nicolas Valticos* (ILO, Geneva, 2004), 411-462 (at 411).

⁷⁵ Art 3 of the 1998 Declaration.

⁷⁶ Art I (2) of the Follow-up to the 1998 Declaration.

⁷⁷ Art I (3) of the Follow-up to the 1998 Declaration, *juncto* Art 19 (5) (e) of the ILO Constitution. See also M. N'Diaye, 'The Annual Review and the promotion of the 1998 ILO Declaration on Fundamental Principles and Rights at Work: Developments and initial impact assessment', *op cit*, 412-414, note 76.

⁷⁸ M. N'Diaye, 'The Annual Review and the promotion of the 1998 ILO Declaration on Fundamental Principles and Rights at Work: Developments and initial impact assessment', *op cit*, 413, note 76.

⁷⁹ Art II.1 of the 1998 Declaration Follow-up.

to give greater exposure to and raise awareness about the CLSs.⁸⁰ Furthermore, by its iterative yearly cycle, it is argued that the ILO has been able to trigger national efforts to respect, promote and realise the principles and rights of the 1998 Declaration. This has in particular been done by:

‘(i) legal recognition; (ii) policy and institutional reforms; (iii) legislative and regulatory changes; (iv) preventive, enforcement and sanctions mechanisms; (v) promotional/advocacy and capacity-building activities; (vi) special attention to particular situations or groups; and (vii) data collection and information. This impact is further enhanced by: (viii) a regular and constructive national, regional and international dialogue on FPRW; (ix) the development of technical cooperation needs to promote and implement the Declaration principles and rights; and (x) the increased pace of ratification of the ILO fundamental Conventions.’⁸¹

In terms of the regulatory role in the global space, these mechanisms clearly show a hybrid constellation between traditional rule-setting by the ILO core Conventions, which are broadened into standards by the 1998 Declaration, and problem-solving mechanisms of the Follow-up to the Declaration. More specifically, the latter exists of mechanisms that create a bottom-up process based on which problems are identified and solutions are sought by the involvement of several stakeholders, the collection and dissemination of information, and deliberation and cooperation.

The third regulatory initiative of the ILO is the Tripartite Declaration of principles concerning multinational enterprises. The Tripartite Declaration intends to ‘guide the governments, the employers’ and workers’ organizations and the multinational enterprises in taking such measures and actions and adopting such social policies, including those based on the principles laid down in the Constitution and the relevant Conventions and Recommendations of the ILO, as would further social progress’.⁸² Furthermore, it refers to the 1998 Declaration and the core labour Conventions that are to be complied with by the governments as well as the MNEs.⁸³ The Tripartite Declaration differs significantly from the 1998 Declaration since its personal and material scope is wider. MNEs belong to its target group and it is not confined to the fundamental principles and rights at work, but also covers principles on labour issues such as the promotion and protection of employment, training, and conditions of work and life. For each subject it is emphasised that governments should ratify the related Conventions if they have not done so yet, whereas MNEs are to abide by the laws and policies of the countries they are active in. Indirectly, it is pointed out to MNEs which standards they should at least uphold.⁸⁴ More particularly, MNEs are encouraged to implement the principles of the Tripartite Declaration into their daily business policies.

⁸⁰ M. N’Diaye, ‘The Annual Review and the promotion of the 1998 ILO Declaration on Fundamental Principles and Rights at Work: Developments and initial impact assessment’, *op cit*, 414-415, note 76.

⁸¹ M. N’Diaye, ‘The Annual Review and the promotion of the 1998 ILO Declaration on Fundamental Principles and Rights at Work: Developments and initial impact assessment’, *op cit*, 426, note 76. In the remainder of this chapter, N’Diaye gives an elaborate analysis of all of these mechanisms.

⁸² Art 5 of the Tripartite Declaration.

⁸³ Art 8-10 of the Tripartite Declaration.

⁸⁴ For instance, Art 58 of the Tripartite Declaration, which holds references to ILO Recommendation 130 concerning the Examination of Grievances within the Undertaking with a View to Their Settlement, and, more relevant to this paper, to all eight fundamental Conventions of the ILO dealing with the CLSs.

How MNEs are to implement these principles into their ordinary business policies is not specified. This is done in the separate MULTI programme.⁸⁵ MULTI aims to raise awareness about the existence of the Tripartite Declaration, and to this end encompasses several key means of action. These actions include a 'helpdesk' for business on CLSs that provides tools and resources to assist managers and workers of MNEs on how they can better align business operations with the CLSs and on how they can build good industrial relations.⁸⁶ Other key means of action are capacity building and training activities by the ILO training centre in Turin; projects on topic areas of the Tripartite Declaration; and including the Tripartite Declaration into the mainstream of other ILO policies, among which those promoting CSRs, through collaboration of the ILO with other international organisations such as 'the UN Global Compact, the OECD, and ISO'.⁸⁷

In essence, the Tripartite Declaration and its follow-up programme MULTI regulate the ILO CLSs in a similar way as the 1998 Declaration and its Follow-up. The Tripartite Declaration broadens the rights of the ILO Conventions into standards and principles to be incorporated in the ordinary business policies of MNEs; the MULTI programme provides the (problem-solving) mechanisms to help MNEs achieve this. More specifically, the main mechanisms of the MULTI programme include experimentation, dissemination of knowledge, and the creation of the participation of stakeholders. The latter includes governments (concerning ratification and implementation of the relevant ILO Conventions), management and workers' representatives of MNEs, several bodies and committees of the ILO, and collaboration with other international organisations.⁸⁸

Regarding the hybrid configuration of these initiatives with the ILO core Conventions the following can be noticed. The Conventions themselves form a transformative hybrid configuration with the ILO supervisory system by which the implementation of the Conventions in general is monitored. The supervisory system is a sophisticated system that not only relies on traditional command and control mechanisms, but also on problem-solving mechanisms.⁸⁹ The latter role is further elaborated and enforced by the governance efforts and activities that are undertaken under the two declarations: the 1998 Declaration and the Tripartite Declaration. Moreover, the hybrid configuration with the 1998 Declaration and its Follow-up can be considered transformative as well, since their ultimate aim is the ratification and implementation of the ILO core Conventions. To achieve this the rights in the core Conventions are broadened by the 1998 Declaration into standards. Furthermore, the Follow-up programme provide mechanisms to help countries that have not (yet) ratified the core Conventions and aim to identify the problems the countries encounter, to address those problems and to solve them in order to pave the path for the ratification of the Conventions. Also the Tripartite Declaration and the MULTI programme form a transformative configuration with the ILO core Conventions. The Tripartite Declaration broadens the target group since it also explicitly addresses MNEs next to the governments and

⁸⁵ <http://www.ilo.org/empent/units/multinational-enterprises/lang-en/index.htm>.

⁸⁶ <http://www.ilo.org/empent/areas/business-helpdesk/tools-resources/lang-en/index.htm>.

⁸⁷ <http://www.ilo.org/empent/units/multinational-enterprises/lang-en/index.htm>.

⁸⁸ <http://www.ilo.org/empent/units/multinational-enterprises/lang-en/index.htm>. Interestingly, this webpage also holds a reference to the website of UN Global Compact. On the other hand, since both are part of the UN, (even though the ILO was constituted in 1919, it became a specialised agency of the UN in 1946) it is not that surprising.

⁸⁹ Cf D. A. Morse, *The Origin and Evolution of the I.L.O. and Its Role in the World Community* (New York State School of Industrial and Labor Relations, Cornell University, Iaca, 1969), 37-73. On this in the wider concept of soft law/new governance, see also B. P. ter Haar, *Open Method of Coordination. An analysis of its meaning for the development of a social Europe* (Leiden University Press, Leiden, 2012), 44-48.

employers' and workers' organisations. Furthermore, it encourages MNEs to incorporate the CLSs into their ordinary business policies. Secondly, it recognises the ILO core Conventions as being the predominant rule-setter of CLSs, which can be deduced from the fact that it refers to the core Conventions whenever possible. The Tripartite Declaration itself forms a transformative configuration with the MULTI programme. Their configuration is rather similar as the one between the 1998 Declaration and its Follow-up: the Tripartite Declaration broadens the core labour rights into standards, whereas the MULTI programme includes problem-solving mechanisms that aim to support MNEs to identify problems and help to overcome them in order to implement the CLSs into their day-to-day business policies.

Besides the recognition of the ILO core Conventions as the predominant rule-setting initiative, the Tripartite Declaration intends to be complementary to other initiatives as well, since it explicitly recognises the coexistence of the 1998 Declaration and the initiatives of other international organisations, including UN Global Compact and the OECD Guidelines. This is a consciously designed complementarity, since the Tripartite Declaration promotes and encourages collaboration with these initiatives, making it a well-embedded initiative in the global space of ILO CLSs.

B. OECD Guidelines

The OECD Guidelines for Multinational Enterprises, adopted in 1976, 'are recommendations addressed by governments to multinational enterprises operating in or from adhering countries. They provide non-binding principles and standards for responsible business conduct in a global context consistent with applicable laws and internationally recognised standards.'⁹⁰ The Guidelines aim to promote positive contributions by enterprises to economic, environmental and social progress worldwide. They clarify shared expectations for business conduct of the governments and provide a point of reference for enterprises and other stakeholders. Consequently, they 'both complement and reinforce private efforts to define and implement responsible business conduct'.⁹¹ The labour rights to be taken into account by the enterprises include the core labour rights of the ILO (Section V: Employment and Industrial Relations of the Guidelines). These rights are further clarified by the commentaries, which include elaborate references to the ILO Conventions.⁹² Hence, the Guidelines do not formulate new norms; they promote the implementation of the norms defined by the ILO Conventions. To support an effective implementation of the norms, the Guidelines oblige the adhering Member States to establish National Contact Points (NCPs). The NCPs have three main tasks: 1. to make the Guidelines known and available; 2. to raise awareness of the Guidelines and their implementation procedures; and 3. to respond to enquiries about the Guidelines. These tasks are conducted in cooperation with and in the service of the business community, workers' organisations, other non-governmental organisations, the interested public, other NCPs and governments of adhering countries.⁹³ The latter task, to respond to enquiries, includes the resolution of issues that arise as a result of the implementation of the Guidelines in 'specific instances'. In other words, the NCP will operate as a dispute settlement body in case of alleged non-observance with the Guidelines.⁹⁴ These 'specific instances' are dealt with in three phases:

⁹⁰ OECD Guidelines for Multinational Enterprises, 2011 Edition, 3.

⁹¹ *Ibid.*, 15.

⁹² *Ibid.*, 37-41.

⁹³ *Ibid.*, Part II: Implementation Procedures of the OECD Guidelines for Multinational Enterprises, 72.

⁹⁴ *Ibid.*, 72-74 (C. Implementation in Specific Instances).

1. 'Initial assessment: to determine if the issues raised merit further examination.
2. Offer of good offices: to seek advice and facilitate access to consensual and non-adversarial means to resolve the issues.
3. Conclusion: to issue statements or reports.'⁹⁵

An action for a 'specific instance' can be initiated by all organisations involved with the implementation of the Guidelines, including the business community, workers' organisations, and other NGOs.⁹⁶ In terms of regulatory mechanisms, this qualifies as a traditional command and control mechanism: norms formulated in the Guidelines are observed by a special body, the NCPs, based on actions of alleged non-compliance. Since 2011 (the last update of the Guidelines) the 'specific instance' has been complemented by a 'proactive agenda' in order to help 'enterprises identify and respond to risks of adverse impacts associated with particular products, regions, sectors or industries'.⁹⁷ Here too the NCPs have a pivotal role, since they maintain regular contact with social partners and other stakeholders. Three projects have been initiated in this context: due diligence in the financial sector; stakeholder engagement and due diligence in the extractive sector; and responsible investment in agricultural supply chains.⁹⁸ In regulatory terms this means that the command and control mechanism of the 'specific instance' is complemented with a problem-solving mechanism identifying the problems and supporting enterprises to find solutions in order to prevent situations of non-compliance.

As for hybridity, the Guidelines are positioned between public law initiatives, ie all three ILO initiatives on the one hand and the private initiatives of the MNEs on the other hand, among which unilateral CSR policies as well as IFAs (see below section IV.B and IV.C). More specifically, the Guidelines do not formulate new labour standards nor intend to do so. They clearly recognise the ILO as the competent body to set international labour standards: 'the OECD Guidelines and the ILO MNE Declaration refer to the behaviour expected from enterprises and are not intended to parallel and not conflict each other'.⁹⁹ Moreover, since the Tripartite Declaration of the ILO is more elaborate it can be of use for the interpretation of the Guidelines. Only the responsibilities for the follow-up procedures are to remain institutionally separate.¹⁰⁰ This refers in particular to the NCPs and the system of 'specific instances' that are complemented by the proactive agenda. Given the strong and emphasised link with the ILO initiatives and its regulatory mechanisms, the hybrid configuration could be qualified as transformative, in the sense of an extra forum to promote the implementation of the ILO CLSs, including an extra mechanism to observe compliance and to preventively tackle possible problems. The added, transformative value in the OECD Guidelines lies in the fact that they address the enterprises and that those enterprises' compliance can be observed, while the ILO can only do this with respect to its Member States. The same mechanisms are complementary to the private initiatives of the enterprises that have their seat in the countries that adhere to the OECD Guidelines. It is complementary to the initiatives that provide well-elaborated implementation and compliance mechanisms,

⁹⁵ Ibid, 72-73; and <http://mneguidelines.oecd.org/specificinstances.html>.

⁹⁶ For an overview of specific instances, see <http://mneguidelines.oecd.org/database/#d.en.217490>.

⁹⁷ <http://mneguidelines.oecd.org/proactiveagenda.html>.

⁹⁸ Ibid.

⁹⁹ OECD Guidelines for Multinational Enterprises, 2011 Edition, 37 (Commentary 48).

¹⁰⁰ Ibid.

hence could be considered transformative with respect to initiatives that provide weak or lack such mechanism.¹⁰¹

C. UN Global Compact

UN Global Compact is not the first initiative of the UN that appeals to companies to act in a socially responsible way. However, having learned lessons on the difficulties to adopt a legally binding initiative,¹⁰² UN Global Compact evolved as a voluntary, non-binding strategic policy platform that intends to be politically authoritative, but is legally non-binding.¹⁰³ Furthermore, it is a multi-stakeholder platform, including businesses and non-business entities, among which NGOs, business associations, and workers' organisations. The platform of UN Global Compact enables them to proactively network and engage in the areas of the ten principles.¹⁰⁴ Within the context of UN Global Compact different activities are undertaken which all stakeholders can participate in. These activities include for instance training, meetings and workshops on specific subjects, local networks and webinar series.

The intended authority is based on the content of UN Global Compact: the ten principles. In this respect the UN Special Representative, John Ruggie, emphasises that the core elements of these principles have also been adopted by other international standard-setting bodies, among which the OECD, ISO and the European Union.¹⁰⁵ More particularly concerning the labour rights, general reference is made to the ILO 1998 Declaration and the ILO Helpdesk for Business on International Labour Standards, which is part of MULTI (see above section III.A), whereas it is also recognised that the ILO Conventions are the regulatory source for the labour rights.¹⁰⁶

The monitoring of the compliance with the ten principles under the programme is weak, since it merely requires the participating businesses to annually submit Communication on Progress (COP) reports. These COP reports are not verified. Instead, UN Global Compact relies on 'fire alarms' raised by the public or civil society, for instance by highlighting cases of poor performance or disingenuous reporting.¹⁰⁷ A firm that fails to submit a COP is first listed as 'non-communicating' and after two years as 'in-

¹⁰¹ For example: the IUF (a GUF) has initiated a 'specific instance' against Accor, whereas they also have concluded an IFA with Accor. The issue at stake was the establishment of trade unions in three hotels. A right that is part of the IFA and the Guidelines. Both refer to the ILO Conventions on this issue. The IFA stipulates that any differences arising from the implementation of the agreement are to be examined jointly – by the management of Accor and the IUF (http://www.iuf.org/cgi-bin/dbman/db.cgi?db=default&ww=1&uid=default&ID=163&view_records=1&n=1). Hence, recourse has been sought to the procedure of the OECD: <http://mneguidelines.oecd.org/database/instances/fr0012.htm>.

¹⁰² Cf J. G. Ruggie, *Just Business. Multinational Corporations and Human Rights*, op cit, 55-80; R. M. M. Wallace & O. Martin-Ortega, 'The UN Norms: A First Step to Universal Regulation of Transnational Corporations' Responsibilities for Human Rights?', (2004) 26 *Dublin University Law Journal*, 304-319; and P. P. Miretski & S. D. Bachmann, 'The UN "Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with regard to Human Rights": A Requiem', op cit.

¹⁰³ J. G. Ruggie, *Just Business. Multinational Corporations and Human Rights*, op cit, xlii-xliv; and G. Kell, '12 Years Later: Reflections on the Growth of the UN Global Compact', (2013) 52 *Business & Society* 1, 31-52.

¹⁰⁴ <http://www.unglobalcompact.org/AboutTheGC/index.html>.

¹⁰⁵ J. G. Ruggie, *Just Business. Multinational Corporations and Human Rights*, op cit, xxi.

¹⁰⁶ <http://www.unglobalcompact.org/Issues/Labour/index.html>.

¹⁰⁷ D. Berliner & A. Prakash, 'From norms to programs: The United Nations Global Compact and global governance', (2012) *Regulation and Governance*, 4, note 110.

active'. The latter means that the company can no longer use the logo of UN Global Compact or participate in any of the events. A company can return to the active status by simply submitting a COP report.¹⁰⁸

With regard to the regulatory mechanism set by UN Global Compact, the above already makes clear that the programme does not intend to be a rule-setter itself. On the contrary, it aims to make the ten principles mainstream in business strategy and operations around the world and to catalyse business action in support of UN goals and issues.¹⁰⁹ Therefore, it is deliberately designed as 'non-hierarchical and non-regulatory in character. It is visualised as a learning network rather than a compliance-based standard, focussing on "norm-diffusion and the dissemination of practical know-how and tools"'.¹¹⁰

However, the regulatory capacity of UN Global Compact lies not so much with its monitoring mechanism, but with its influential diffusion as an inspiration and learning platform for other, private initiatives.¹¹¹ Consequently, UN Global Compact follows 'the logics of appropriateness' (conduct based on notions of duty, responsibility, identity and obligations), rather than 'the logics of consequences' (conduct based on expected gains and losses).¹¹²

UN Global Compact is complemented by the Ruggie Framework, which is comprised of three pillars: the duty of a state to protect human rights; the corporate responsibility to respect human rights; and access to remedy.¹¹³ Regarding regulatory mechanisms, the Ruggie Framework can be characterised as rule-setting. Under the first two pillars, rules are set about the sort of behaviour that is expected of states and corporations when implementing the ten principles, whereas the third pillar foresees in a mechanism of *ex post* control with the emphasis on remediating proven infringements of one of the ten principles. Although the Ruggie Framework is also legally non-binding, it has been received as a positive addition to the Global Compact programme, since it provides an extra incentive and legitimacy for companies to take their social responsibility,¹¹⁴ either via the adoption of unilateral codes of conduct, or, as promoted by the Global Compact programme, by IFAs^{115, 116}

In terms of hybrid configurations it can be noted that UN Global Compact recognises all other international and transnational regulatory initiatives. Regarding the ILO it can be considered as transformative, since it consciously promotes the implementation of the CLSs as defined by the 1998 ILO Declaration and the ILO core Conventions. In fact, it adds an extra regulatory mechanism to that of the ILO, which is characterised

¹⁰⁸ Ibid.

¹⁰⁹ <http://www.unglobalcompact.org/AboutTheGC/index.html> and M. Vinkovic, 'The role of Soft Law Methods (CSR) in Labour Law', 2012, paper presented at MTA-PTE Research Group of Labour Law Conference on Recent Developments in Labour Law, Hungary. Available at <http://mta-pte.ajk.pte.hu/index.php?lang=en&link=conference>.

¹¹⁰ D. Berliner & A. Prakash, 'From norms to programs: The United Nations Global Compact and global governance', *op cit*, 1-18 (citation: 3-4); and J. G. Ruggie, 'Business and Human Rights: The Evolving International Agenda', (2007) 101 *American Journal of International Law*, 819-840 (citation: 820).

¹¹¹ Ibid., 6-8.

¹¹² J. G. Ruggie, *Just Business. Multinational Corporations and Human Rights*, *op cit*, 106.

¹¹³ J. G. Ruggie, 'Report of the Special representative of the Secretary-general on the issue of human rights and transnational corporations and other business enterprises', 2011, Report submitted to the UN Human Rights Council, A/HRC/17/31.

¹¹⁴ Cf J. G. Ruggie, *Just Business. Multinational Corporations and Human Rights*, *op cit*, 166-169.

¹¹⁵ http://www.unglobalcompact.org/Issues/Labour/Global_Framework_Agreements.html.

¹¹⁶ Sections IV.B and IV.C illustrate that a majority of the unilateral CSR codes of conduct and IFAs indeed refer to the UN Global Compact as a source.

by problem-solving and norm-infringing preventive activities and the dissemination of information and practices. It recognises the OECD Guidelines; however, it does not seem to seek connection with the OECD's national contact points. Instead it promotes and supports the development of local networks. Although the OECD and UN Global Compact both operate in the national setting and aim to support the implementation of the CLSs by companies, they can be considered as complementary rather than rivalry, albeit unconsciously. First of all, they operate on different levels – national and local – and secondly, they focus on different techniques – serving as a dispute resolution body and providing proactive support on themes with respect to certain potential risks of infringements versus the dissemination of information and best practices and deliberation with (local) peers. UN Global Compact also recognises the importance of private initiatives. NGOs are recognised as an important partner, in particular with respect to the 'fire alarm' system regarding the validity of the COP reports, and in general for advocating the programme as an authoritative template to be followed in the private initiatives of the companies. Hence, it promotes the use of IFAs as effective initiatives to advance the implementation of the Global Compact labour principles and to improve industrial relations.

IV. GOVERNANCE MECHANISMS AND HYBRIDITY OF PRIVATE REGULATORY INITIATIVES

This section analyses the governance mechanisms and hybridity of private regulatory initiatives. Although the private regulatory initiatives have been divided into three groups – initiatives of NGOs; unilateral codes of conduct of MNEs; and bi/multilateral initiatives involving at least the management of an MNE and workers' representatives – there is no homogeneity within these groups. More precisely, there is no 'standard form' for these initiatives. In particular in the early days, they were self-invented, not only because the actors involved lacked experience in regulating labour issues on the transnational level, but also because they 'cannot reason back their actions and preferences on the basis of the present possibilities or on trajectories travelled by those they relate to, such as their inspiration models, their peers, their opponents, or otherwise'.¹¹⁷ Because of the significant increase of these kind of private initiatives since the 1990s, growing experience, and the development of standards to draw from, this nevertheless seems to be slowly changing.¹¹⁸ This heterogeneity within these groups has implications for the analysis. This is overcome partly by making a selection of initiatives and partly by focusing the analysis on possible tendencies found in the selected initiatives themselves, complemented by findings in empirical case studies.

¹¹⁷ L. Fransen, *Corporate Social Responsibility and Global Labour Standards. Firms and Activists in the Making of Private Regulation* (Routledge, London/New York, 2012), 24.

¹¹⁸ This can be deduced from some empirical case studies, showing that MNEs have adjusted their CSR strategies over the course of time in efforts to make them more effective. However, it goes beyond the scope of this paper to elaborate on this. For further reading on this, see among others R. M. Locke, 'Private efforts to improve global working conditions have failed', (2013) *Boston Review*, available at <http://www.bostonreview.net/forum/can-global-brands-create-just-supply-chains-richard-locke?>; L. Fransen, *Corporate Social Responsibility and Global Labour Standards. Firms and Activists in the Making of Private Regulation*, op cit; and D. Stevis, 'The Impacts of International Framework Agreements: Lessons from the Daimler case', op cit.

A. Initiatives of non-governmental organisations (a selection)

As described in section II.C above NGOs are not homogeneous groups, since they have different aims and focus areas. Nonetheless, they also have similarities. Therefore, this section provides a description of the regulatory mechanisms the initiatives of NGOs have in common, which is complemented with relevant differing details of organisations according to the distinction made in section II.C, and as has been brought forward in the literature.¹¹⁹

When it comes to human rights observance within MNEs, these organisations, as well as some firms themselves, have in common that they are frustrated by the inability of the traditional systems of national and international public organisations to effectively address labour rights.¹²⁰ Secondly, NGOs share the belief that as a consequence of this regulatory gap many MNEs have become dangerous mixes of power and unaccountability. In response, NGOs have created transnational networks that target these corporations.¹²¹ In general, the strategy of NGOs is to create pressure by shaming brands (MNEs) in public opinions for not taking responsibility for their actions and their suppliers concerning labour rights, environmental and social issues. Consequently, MNEs are pushed to adopt CSR policies and have their actions monitored and audited for compliance therewith. NGOs provide labour standards MNEs are to observe in their CSR policies. The monitoring and auditing can be done by the MNEs themselves, but more and more this is done by NGOs.¹²² The monitoring and auditing is also more and more backed up by sanctions (among which formal sanctions, *eg* legal penalisation, associational sanctions like expulsion from accreditation regimes, and informal sanctions including public pressure and corporate campaigns) and incentives (*eg* naming by certificates and capability building).¹²³

NGOs differ in the formulation of the labour standards that are to be observed. However, research indicates that they are converging towards the ILO CLSs.¹²⁴ Furthermore, they differ in 'procedures for auditing (who conducts the monitoring and how), certification (whether a factory or brand is certified), and reporting (what is publicly

¹¹⁹ For an elaborate account of NGO strategies to promote CSRs, see M. Winston, 'NGO Strategies for Promoting Corporate Social Responsibility', (2002) 16 *Ethics and International Affairs* 2, 71-87. For more elaborate descriptions of labour right NGOs, see D. O'Rourke, 'Outsourcing Regulation: Analyzing Nongovernmental Systems of Labor Standards and Monitoring', (2003) 31 *The Policy Studies Journal* 1, 1-29; and for a description of NGOs by characteristics L. Fransen, *Corporate Social Responsibility and Global Labour Standards. Firms and Activists in the Making of Private Regulation*, *op cit*, 195-196.

¹²⁰ D. O'Rourke, 'Outsourcing Regulation: Analyzing Nongovernmental Systems of Labor Standards and Monitoring', *op cit*.

¹²¹ Cf J. Bakan, *The Corporation. The Pathological Pursuit of Profit and Power* (Constable, London, 2004), 27; and L. Fransen & B. Burgoon, 'Global Labour-Standards Advocacy by European Civil Society Organizations: Trends and Developments', (2013) *British Journal of Industrial Relations*.

¹²² C. Sabel, D. O'Rourke, & A. Fung, 'Ratcheting Labor Standards: Regulation for Continuous Improvement in the Global Workplace', 2000, KSG Working Paper No 00-010, available at <http://www.law.columbia.edu/lawec/>.

¹²³ D. O'Rourke, 'Outsourcing Regulation: Analyzing Nongovernmental Systems of Labor Standards and Monitoring', *op cit*, 10-11; C. Sabel, D. O'Rourke & A. Fung, 'Ratcheting Labor Standards: Regulation for Continuous Improvement in the Global Workplace', *op cit*, 33; and most elaborately on this: M. Winston, 'NGO Strategies for Promoting Corporate Social Responsibility', (2002) 16 *Ethics and International Affairs* 2, 71-87.

¹²⁴ R. van Tulder & A. Kolk, 'Multinationality and Corporate Ethics: Codes of Conduct in the Sporting Goods Industry', (2001) 32 *Journal of International Business Studies* 2, 267-283; D. O'Rourke, 'Outsourcing Regulation: Analyzing Nongovernmental Systems of Labor Standards and Monitoring', *op cit*, 7.

disclosed').¹²⁵ The main consequence of these differences lies with the effectiveness in changing labour practices in MNEs and their global supply chains.¹²⁶

Concerning the regulatory mechanisms, empirical case studies show a tendency away from traditional compliance programmes (mostly audits) sought to deter violations of codes of conducts and penalising factories, towards, what Locke calls 'capability-building' mechanisms that seek to prevent violations by 'providing the skills, technology, and organizational skills that enable factories to enforce labor standards [and improve working conditions] on their own'.¹²⁷ Consequently, the scope of actors involved is also broadened from mainly management to all relevant stakeholders that are, with (financial) support and training, enabled to step up where appropriate and necessary. Furthermore, it includes a movement from fixed rules to be complied with towards ongoing deliberation focusing on finding solutions to prevent violations. A tendency that was, in theory, elaborated on by Sabel, O'Rourke and Fung in 2000,¹²⁸ noted by O'Rourke in 2003, and by Fransen and Burgoon in 2013, all analysing regulatory efforts of different NGOs,¹²⁹ which can also be seen in the brief characterisations of six NGOs in Box 1. In terms of regulatory mechanisms used in this paper, this means a tendency moving away from command and control rule-setting towards multi-stakeholder deliberative problem-solving.

When considering hybridity between these NGO initiatives and the ILO CLSs, the following can be noticed. Of the six NGOs characterised in Box 1, only two make no reference to any other initiative at all, whereas the other four make explicit reference to the ILO Conventions and two also to UN initiatives. When this is combined with the sort of regulatory mechanisms that are in general applied, problem-solving, a convincing impression arises of NGO initiatives aiming to be complementary to the ILO Conventions. While the ILO sets the standards and norms in the Conventions, their implementation is promoted and supported by the initiatives of NGOs. This is in particular so when considering the fact that for the vast majority of the NGOs (five out of six in Box 1) the emphasis is on implementation mechanisms that support management efforts to improve their performance towards full compliance with the labour standards. Although it would go too far to qualify this form of hybridity as transformative, it comes close when it is emphasised that NGOs are able to press companies to participate in their schemes, while the ILO (and other public organisations) lacks force and means to do so.

¹²⁵ D. O'Rourke, 'Outsourcing Regulation: Analyzing Nongovernmental Systems of Labor Standards and Monitoring', *op cit*, 11; with an overview of differences in these systems of FLA, SA8000 and Worldwide Responsible Apparel Production, at 12 and 13.

¹²⁶ D. O'Rourke, 'Outsourcing Regulation: Analyzing Nongovernmental Systems of Labor Standards and Monitoring', *op cit*, 19. An issue that will not be further addressed since it exceeds the scope of this contribution.

¹²⁷ R. M. Locke, 'Private efforts to improve global working conditions have failed', *op cit*.

¹²⁸ *Ibid*.

¹²⁹ D. O'Rourke, 'Outsourcing Regulation: Analyzing Nongovernmental Systems of Labor Standards and Monitoring', *op cit*, 19-20; L. Fransen & B. Burgoon, 'Global Labour-Standards Advocacy by European Civil Society Organizations: Trends and Developments', *op cit*, 21-22, note 15.

Box 1. The summarised characteristics of six NGOs

The issues used to characterise the NGOs are: the standards formulated, including references to other initiatives; actors involved; implementation and compliance mechanisms; and sanctions/incentives.

1. Human Rights Watch (HRW)

(www.hrw.org)

HRW promotes human rights in its broadest sense, including the issues of child labour and forced labour, however, without making reference to specific norms.

HRW conducts regular, systematic investigations into human rights abuses around the world (more than 90 countries). Their investigations aim to come to a full understanding of the incident in which rights have been violated and to gain a strong sense of the local political, social, and cultural context of the violation. While conducting an investigation, HRW relies on information from local human rights activists, lawyers, journalists and civil society members as well as state and government officials.

The working method of HRW is not merely issuing reports on the status of human rights. In particular where problems are signalled, the reporting is complemented by an advocacy approach. This means that not only violations, victims and violators are identified, but that it is also determined 'who can and should take responsibility for stopping rights violations and providing redress, the detailed and specific steps they need to take, and who else can bring influence and leverage to bear'.

HRW uses 'shaming' via expressing public opinions in order to press for attention for the violated rights. Once attention is gained the HRW researchers engage in a persuasive and constructive dialogue with a wide range of possible influential actors in order to tackle and stop the violations.

2. Ethical Trading Initiative (ETI)

(www.ethicaltrade.org)

The ETI is an alliance of companies, trade unions and voluntary organisations that work in partnership in order to improve the working life of poor and vulnerable workers across the globe.

Companies that want to participate in the ETI have to adopt the ETI Base Code which is based on ILO Conventions. Furthermore, they have to sign up to the ETI's Principles of Implementation, which require companies to demonstrate clear commitment to ethical trade; to integrate ethical trade into their core business practices; to stimulate year-on-year improvements of working conditions; to support suppliers to improve working conditions; and to report openly and accurately about their activities. Besides self-reports, the ETI secretariat, together with trade union representatives and NGO members, conducts random validation visits to a minimum of twenty per cent of the reporting companies. Except for consolidation of the company reports, the visits also aim to build dialogue about the progress that is made and problems that arise.

Alleged violations of the base code are not backed up by sanctions. Instead a procedure is in place for investigation and remediation. Investigation is conducted by the ETI Member company, who is also responsible for negotiating a remediation plan with the (violating) supplier. The plan is to take into account the nature of the violation and the type of remediation required. For the latter, solutions can be drawn from good practices that have been disseminated by the ETI secretariat as found in either annual reports of other Member companies or of pilots (see the ETI Alleged

Code violation Guidelines). Moreover, instead of shaming brands and lead companies, ETI offers a platform to exchange good practice in order to improve working conditions within their supply chain by building capability through partnerships.

3. Social Accountability International (SAI): SA8000 Standard

(www.sa-intl.org)

The SA8000 standard is a certification system for decent workplaces. It is based on the Conventions of the ILO and the UN. It aims to create a common language among industry and corporate codes in order to measure social compliance.

It uses a management system approach by setting out the structures and procedures companies must adopt to ensure that compliance with the code is continuously reviewed.

Compliance with the code is initially reviewed by the company that applies for the certificate. This is audited by an independent SAAS-accredited Certification Body. In case non-conformity is found, corrective actions are to be taken in due time after the non-compliances have been identified. Since the certificate represents a procedure and performance-type process, the emphasis is on improving performance rather than products that have been produced in full compliance with the labour standards. Secondly, the support offered by SAI therefore exists of information about the standards, capacity building and technical assistance, including SA8000 auditor training seminars and professional development workshops.

SA8000 is not backed up by negative sanctions, such as a certification withdrawal. Instead it provides positive incentives, like discussing the problems and identifying non-conformances and defining corrective actions.

4. ISO26000

(www.iso.org/iso/home/standards/iso26000.htm)

The International Organization for Standardization (ISO) holds a portfolio of over 18.400 standards providing business, government and society with practical tools for sustainable development.

Unlike other standards, eg 14.000 on environment, ISO 26000 is not for certification purposes. Hence, it facilitates trade, spreads knowledge, disseminates innovative advances in technology and shares good management and conformity assessment practices. ISO provides positive reasons for companies to participate, for example: competitive advantage, reputation, and relationships with companies, governments, the media, suppliers, peer customers and the community in which they operate. More particularly, ISO 26000 deals with social responsibility and provides guidance. This guidance includes the definition of concepts and terms related to social responsibility; principles and practices; the integration, implementation and promotion of social responsible behaviour throughout the organisation; the identification and engagement with stakeholders; and communication of commitments and performance on social responsibility.

It is not backed up by negative sanctions, but focuses on support and facilitations in order for a company to improve an organisation's contribution to social responsibility in particular and sustainable development in general.

5. Fair Labor Association (FLA)

(www.fairlabor.org)

Companies that join the FLA are to commit to 10 Principles of Fair Labor and Responsible Sourcing and have to agree to uphold the FLA Workplace Code of

Conduct throughout the entire supply chain. The code is based on the ILO standards and internationally accepted good labour practices.

The FLA has developed a multi-stakeholder approach including three key constituents: universities, civil society organisations (including trade unions) and companies.

The FLA replaced its conventional checklist auditing system that revealed the most egregious code violation and allowed for Band-Aid fixes with the Sustainable Compliance methodology (SCI). This is essentially aimed at identifying and tackling violations in a sustainable way in order to prevent (repetitive) violations. Companies have to assess themselves (internal monitoring) and are assessed by FLA assessors, who collect information via local civil society organisations (including trade unions), observations, interviews with management and workers (on- and off-site) and surveys. The information is processed and translated into findings and used to set priority actions. The reports are published on the website of FLA. The monitoring is complemented with a third party complaint process which allows FLA to intervene rapidly when workers' rights have been violated or are at risk. In this process all relevant stakeholders are involved, including civil society organisations, trade unions, government agencies and management.

FLA does not sanction its affiliates nor does it create strong incentives. Indirectly it holds a system of naming (incentive), since being accepted as an FLA affiliate means that the brand or company takes its CSR policy serious.

6. Fair Wear Foundation (FWF)

(www.fairwear.org)

The FWF works with companies and factories to improve labour conditions for garment workers. The FWF restricts its focus to the phases of production where sewing is the main manufacturing process (it is the most labour-intensive phase). The core of the FWF code is made up by eight labour standards derived from ILO Conventions and the UN Declaration on Human Rights.

The FWF does not guarantee that products are produced in full compliance with its code (no product certification), but it verifies that its members work hard, step by step, to be in full compliance with the standards. Therefore, FWF applies a multi-stakeholder approach by which the company compliance claims and performance activities are verified on three levels: factory level; company level and country level. The verification is not conducted via a command-control structure. Rather it is based on several forms of cooperation: cooperation between factories and companies; cooperation with other multi-stakeholder initiatives (eg the Jo-In Platform, which also involves the FLA); and cooperation with trade unions and business associations. Since the verification is conducted by a third party, it enhances the credibility of the company regarding its claims of compliance with labour standards. As such, the system of the FWF provides mainly positive incentives for participation and no sanctions. This is enhanced by the FWF's aim, which is to support participating companies, on a step-by-step basis, to effectively implement the FWF Code of Labour practices. Although the FWF requires companies to provide a complaint procedure on alleged violations, the emphasis lies with corrective action plans and verifiable improvements, and capability training.

B. Unilateral initiatives by MNEs

In general, CSR initiatives are a response of MNEs to deal with the negative effects of economic globalisation on labour rights, such as low wages, long working hours and poor health and safety conditions in their increasingly complex global supply chains.¹³⁰ As indicated in the introduction of this section the content and form of the unilateral initiatives by MNEs (further referred to as CSR codes of conduct) vary significantly. The data of the sample that is used for the analysis in this paper indicate that this variety is unrelated to sector or region as is sometimes presumed in the literature. Insofar as a general statement can be made, it may be noted that most of the CSR codes of conduct do not exist of merely one document, but of several related documents that address several aspects of corporate governance. These may include documents dealing with business ethics (business code of conduct), human rights (code of conduct), environmental and societal issues (often existing of several actions described on the website of the MNE), and a 'whistle blowing' policy (see table 1).

When analysing the content of the sample of twenty CSR strategies it can be concluded that, in general, MNEs do not intend to create labour standards. Only in three occasions no reference at all was found, whereas the vast majority refers to public initiatives or private initiatives of NGOs (see table 1). In this sample, most often referred to are the principles of the UN Global Compact and the ILO (especially Convention 182 on the abolition of child labour). Reference is also found to SA8000 (twice) and ISO 26000 (once).¹³¹ Furthermore, it should be noted that not all companies refer to another initiative, whereas their CSR policy is actually based on another initiative. This is for instance so for Nike: the website makes no reference to the Fair Labour Association, but Nike is involved in it and is one of the founding fathers.¹³²

As for the governance mechanisms the initiatives are rather vague. In general they formulate open standards or principles they aim to ensure within their company and their global production or service chain. Furthermore, they at best indicate that compliance will be monitored – mostly by audits or reports – or that implementation will be supported – often via training and awareness raising about the existence of rights.¹³³ However, empirical case studies show that in practice these governance mechanisms are becoming more refined and complex. Moreover, some of these case studies indicate a tendency that these mechanisms are developing from rather traditional compliance and control mechanisms towards more supportive and preventive implementation mechanisms that aim for capability building throughout the company chain.¹³⁴ In

¹³⁰ M. Anner, 'The Limits of Voluntary Governance Programmes: Auditing Labor Rights in the Global Apparel Industry', 2011, Project for Global Workers' Rights, working paper 01, available at <http://lser.la.psu.edu/gwr/projects.shtml#workingpapersproject>, 2.

¹³¹ I have considered whether my selection is biased, because it includes companies that have been ranked highly by csrhub.com. To check this I have randomly picked one other company – Santander, a bank seated in the US – that is on the bottom of the list. Despite the low ranking, the CSR policy includes references to the UN GC, the OECD Guidelines, and the ILO Tripartite Declaration.

¹³² On this see also R. Jenkins, 'The political economy of codes of conduct', in R. Jenkins, R. Pearson & G. Seyfang (eds), *Corporate Responsibility & Labour Rights. Codes of Conduct in the Global Economy* (Earthscan, London, 2002), 19.

¹³³ See for a more elaborate analysis of the content of CSRs: A. Kun & J. Hajdú, 'Conceptualization of Corporate Social Responsibility in the Context of Labor Law', in R. Blanpain, W. Bromwich, O. Rymkevich & I. Senatori (eds), *Rethinking corporate Governance: From Shareholder Value to Stakeholder Value* (Kluwer Law International, Alphen aan den Rijn, 2011), 175-194.

¹³⁴ For some interesting case studies on this, see R. M. Locke, 'Private efforts to improve global working conditions have failed', *op cit*, and for a similar development regarding IFAs, see sec-

other words, the regulatory mechanisms are moving away from rule-setting towards problem-solving.

With respect to hybrid configurations, this sample of twenty unilateral CSR codes indicates that the standards or principles that are promoted by the MNEs are based on the principles as set by public initiatives. Only three CSR codes of conduct make no reference to any initiative at all, whereas thirteen of these codes refer to the UN GC and eight of them to the ILO core Conventions. About nine codes even refer to more than one other initiative. With these references, the majority of MNEs recognise that the rules set by these public international organisations are guiding, resulting in a conscious complementary configuration. The high ranking could be a result of the participation in programmes like the UN GC, SA8000, ISO 26000 or of adherence to the OECD Guidelines. However, since this is also found for companies that are much lower ranked,¹³⁵ it seems to be more related to the normative quality of the content and the implementation and compliance measures that are also part of those policies.¹³⁶ An insight that is supported by findings in empirical case studies and an upcoming tendency within companies that are striving for more effectiveness of their CSR policies in terms of implementation and compliance.¹³⁷ Part of the development of the normative quality of the implementation and compliance mechanisms is the involvement of all relevant stakeholders within more innovative forms of governance. These stakeholders include other private actors, such as SA8000 and the FLA, as well as public actors, among which international organisations like the UN GC and the ILO, but also national governments.¹³⁸

Furthermore, it can be concluded that a chain of complementary hybridity is created. The vast majority of CSR codes of conduct in this sample refers to the UN GC, which is based on the ILO core Conventions and both its declarations (see section III.B above). Thus, via the shackle of the UN GC, the implementation of the ILO core Conventions is complemented by the promotional activities of the MNEs themselves. From a regulatory point of view, the rule-setting role of the Conventions is, via the principles of the UN GC, complemented by the problem-solving regulatory mechanisms of the UN GC and the unilateral CSR policies of the MNEs themselves.

tion IV.C and D. Stevis, 'The Impacts of International Framework Agreements: Lessons from the Daimler case', *op cit*.

¹³⁵ See footnote 95.

¹³⁶ The normative quality of in particular the implementation and compliance policy of Santander (ranked at the bottom) is shallow compared to that of the sample of the twenty higher-ranked companies. Of course the effectiveness of private initiatives is more complex than only well-developed implementation and compliance policies. This for instance also includes underpinning business strategies (business-driven CSRs or intrinsic human rights CSRs), legitimacy issues, internal power relationships, etc. About this see also J. Bakan, *The Corporation. The Pathological Pursuit of Profit and Power*, *op cit*; L. Fransen, *Corporate Social Responsibility and Global Labour Standards. Firms and Activists in the Making of Private Regulation*, *op cit*; and J. G. Ruggie, *Just Business. Multinational Corporations and Human Rights*, *op cit*.

¹³⁷ Cf R. M. Locke, 'Private efforts to improve global working conditions have failed', *op cit* and for a similar finding with respect to IFAs: D. Stevis, 'The Impacts of International Framework Agreements: Lessons from the Daimler case', *op cit*.

¹³⁸ Cf R. M. Locke, 'Private efforts to improve global working conditions have failed', *op cit*.

Table 1. A selection of CSR Codes by sector and region

No	CSR Code	Sector (indicated by GUF)	Region	Reference to other initiatives
1.	Hewlett-Packard Business Code of Conduct, US public sector CoC, Contingent workers CoC, CoC for suppliers and CoC for Partners Human Rights Policy	UNI	North America	Only in CoC suppliers to ILO CLS, UN GC, OECD, SA8000 and ETI UN GC
2.	HINDUSTAN ZINC LIMITED Business Ethics & Code of Conduct	Industrial	Asia/ Pacific	UN GC, SA8000, ILO Conv (in general) and UN UDHR
3.	TNT Express Business Principles	UNI	North America	UN UDHR
4.	Fluidra Code of Ethics	IUF	Europe	UN GC, UN UDHR, ILO C182
5.	Lonmin Code of Business Ethics, Whistle Blowing Policy & Safety and Sustainability Policy	Industrial	Africa	UN UDHR
6.	Nokia Code of Conduct	UNI	Europe	X
7.	Westpac Group Code of Conduct & Diversity Policy & Whistle Blower Protection Policy & Sustainability Strategy	UNI	Asia/ Pacific (Australia)	UN GC (founding signatory)
8.	Mondi Speakout policy & 5 principles of business ethics (on website only)	BWI	Europe	UN GC
9.	Millipore Corporation Employee Code of Conduct	UNI	North America	X
10.	Management Consulting Group PLC Business ethics & Whistleblowing & employees Group policy (webpage only)	UNI	Europe	UN GC ILO C-182 and C-138
11.	Eskom Ethical Business Conduct (includes whistleblowing hotline)	Industrial	Africa	UN GC ¹³⁹
12.	Coca Cola Hellenic Code of Business Conduct, Equality of Opportunity Policy, Human Rights Policy, Occupational H&S policy & Supplier Guiding Principles Policy	IUF	Europe	UN GC

¹³⁹ <http://www.eskom.co.za/c/article/246/un-global-compact/>.

No	CSR Code	Sector (indicated by GUF)	Region	Reference to other initiatives
13.	Parsons Brinckerhoff Global Compliance Program and Code of Conduct ¹⁴⁰	UNI	North America	UN UDHR (slavery and equal treatment) Use of own definitions / interpretations on equal treatment and H&S
14.	DSM Code of Business Conduct, Supplier Code of Conduct, Whistleblower Policy and Procedure	Industrial	Europe	ILO C-182 and C-138, UN GC*
15.	Diageo Code of Business Conduct, Supplier Standards, Anti-Discrimination and Human Rights Global Policy	UNI	Europe	ILO core Conventions; UN GC
16.	Asiasat Code of Business Conduct and Ethics, Corporate Governance Guidelines	UNI	Asia / Pacific	X
17.	Sumitomo Internet-based policies, CSR with employees and with society	BWI	Asia / Pacific	UN GC / ISO 26000 Timber
18.	Gap Inc. Human Rights Policy	Industrial	USA	ILO core Conventions, ILO Decl 1998, UN GC, OECD GL, UN UDHR
19.	ASUR	UNI	Latin America	X
20.	BBVA Standards of Conduct and other commitments, Code of Conduct, report BBVA's commitment to human rights	UNI	Latin-America	UN GC. UN UDHR, ILO Conv (in general), OECD GL.

* Not mentioned in the codes, hence under the heading of 'Stakeholder engagements'.

C. Bi/multilateral agreements with workers' organisations (IFAs)

Bi/multilateral agreements come in several varieties.¹⁴¹ However, this section is limited to agreements that are negotiated between management and labour with a transnational coverage. Secondly, it is limited to agreements that involve the participation of global unions in their adoption and implementation. Although this excludes many

¹⁴⁰ This is actually the Code of Conduct of Balfour Beatty, of which Parsons Brinkerhoff is a professional services division (sister company): <http://www.balfourbeattyus.com/About-Us/Related-Companies>.

¹⁴¹ Cf K. Papadakis, 'Introduction and Overview', in K. Papadakis (ed), *Shaping Global Industrial Relations. The Impact of International Framework Agreements* (ILO/Palgrave, Geneva, 2011), 1-18 (at 1-2).

other agreements,¹⁴² it offers a pragmatic advantage of empirical case studies about implementation and compliance mechanisms and qualitative data thereof, as well as quantitative data on references to some other global initiatives, among which the ILO initiatives, the OECD Guidelines, the UN Global Compact and SA8000.

Being instruments that are negotiated between the management of one MNE and a GUF, the content varies per MNE, including the mechanisms for implementation and compliance. Some IFAs stress that it is the responsibility of the company – in exceptional cases only employees are made responsible for it – whereas most IFAs require both sides of the industry to ensure proper implementation.¹⁴³ Similarly with regard to the unilateral initiatives of MNEs, a review of the literature on implementation mechanisms of IFAs learns that the IFAs themselves give scanty information about the governance mechanisms applied to ensure implementation and compliance.¹⁴⁴ In practice, however, complex implementation and compliance mechanisms are applied.¹⁴⁵ With regard to the type of regulatory mechanism, a big strand of literature is searching for traditional command and control regulatory rule-setting mechanisms to give direct effect to IFAs.¹⁴⁶ However, given the lack of such a legal framework and the high improbability of the emergence of such a framework,¹⁴⁷ empirical case studies show a growing awareness in practice of the development of implementation mechanisms.¹⁴⁸ More particularly, in some case studies a tendency is noted that is similar to a tendency in the initiatives of the majority of NGOs and CSR codes of MNEs, namely a (needed) move away from rather traditional command and control mechanisms towards supportive and preventive implementation mechanisms that aim for capability building throughout the company chain.¹⁴⁹ However, to what extent this is the case remains

¹⁴² For instance, transnational collective agreements that are adopted by management and a European trade union and/or a European Works Council. About this see, for instance, I. Schönmann, R. Jagodzinski, G. Boni, S. Clauwaert, V. Glassner & T. Jaspers, *Transnational collective bargaining at company level. A new component of European industrial relations?* (ETUI, Brussels, 2012).

¹⁴³ C. Welz, 'A Qualitative Analysis of International Framework Agreements: Implementation and Impact', *op cit*, 39.

¹⁴⁴ Among others: I. Schönmann, 'The Impact of Transnational Company Agreements on Social Dialogue and Industrial Relations', in K. Papadakis (ed), *Shaping Global Industrial Relations. The Impact of International Framework Agreements* (ILO/Palgrave, Geneva, 2011), 21-37; C. Welz, 'A Qualitative Analysis of International Framework Agreements: Implementation and Impact', *op cit*; and D. Stevis, 'The Impacts of International Framework Agreements: Lessons from the Daimler case', *op cit*.

¹⁴⁵ See, for instance, G. Williams, S. Davies & C. Chinguno, 'Subcontracting and Labour Standards: Reassessing the Potential of International Framework Agreements', (2013) *British Journal of Industrial Relations* (early online publication).

¹⁴⁶ See, for instance, I. Schönmann et al, *Transnational collective bargaining at company level. A new component of European industrial relations* (ETUI, Brussels, 2012); R. Krausse, 'International Framework Agreements as instrument for legal enforcement of freedom of association and collective bargaining? The German Case', (2012) 33 *Comparative Labour Law & Policy Journal*, 749-743; and E. Ales, 'Notes and Debates: Transnational collective bargaining in Europe: The case for legislative action at EU level', (2009) 148 *International Labour Review* 1-2, 149-162.

¹⁴⁷ Eg R. Zimmer, 'Establish a legal framework for transnational collective agreements in Europe: a difficult task', 02/2012 Final report EUROACTA (chapter 2), available at www.ires.it.

¹⁴⁸ Cf D. Stevis, 'The Impacts of International Framework Agreements: Lessons from the Daimler case', *op cit*, on the IFA of Daimler; and more generally: A. Sobczak, 'Ensuring the effective implementation of transnational company agreements', (2012) 18 *European Journal of Industrial Relations* 2, 139-151.

¹⁴⁹ See sections IV.A and IV.B above. See on IFAs in particular: D. Stevis, 'The Impacts of International Framework Agreements: Lessons from the Daimler case', *op cit*, on the IFA of Daimler; and more generally: A. Sobczak, 'Ensuring the effective implementation of transnational company agreements', *op cit*, 139-151.

unclear, since less case studies have been conducted on this subject because most of them are conducted within the complex context of multi-level industrial relations and the capabilities and limits of trade unions in this respect.¹⁵⁰

With respect to hybridity, in terms of acknowledgement of other initiatives, in particular the ILO Conventions on the CLSs, tables 2 and 3 that are annexed to the book edited by Papadakis¹⁵¹ provide the information on 80 IFAs. These are represented in Table 2 below. This table shows that out of 80 IFAs, 69 refer to the ILO fundamental Conventions. More segregated data show that about 30 IFAs cover even more than the core rights with direct reference to the ILO Conventions, in particular Conventions 135¹⁵² and 155¹⁵³. Oppositely, eleven IFAs make no reference to the ILO fundamental Conventions. However, of these eleven IFAs, three refer to the ILO 1998 Declaration, one to two other initiatives, namely the OECD Guidelines and UN Global Compact, and one to SA8000. Of the remaining six IFAs, three refer to some CLSs, which leaves only three IFAs (Falck, Metro and UPU) that globally speaking seem to operate solitarily. This is actually only true for the IFA of UPU, which aims to establish cooperation to promote social dialogue. The IFA of Metro is slightly more specific and, with a bit of good will, an indirect reference to two fundamental Conventions can be read in it, namely to the Conventions on the right of association and on the right to collective bargaining. The IFA of Falk does not aim at the implementation of CLSs, but at the establishment of a world works council, which could be the first step towards a bi/multilateral agreement that strives for the implementation of CLSs. On the other hand, there is also a substantial number of IFAs (sixteen) that refer to several other initiatives. When the regulatory mechanism is taken into account, the vast majority seems to be merely repeating the standards of the ILO or those of other public initiatives. That is, if the tendency in (legal) literature about IFAs is followed that focuses on the creation of a legal framework in order to create direct effect. Such focus essentially mirrors a traditional command and control rule-setting approach. In terms of hybrid configurations this means that IFAs are not rivals with respect to the ILO Conventions; however, in terms of complementarity, they hardly add anything. Nevertheless, this might change when theoretical considerations and scarce good practices found in some empirical case studies as discussed above, are adopted and a shift is made towards implementation and compliance mechanisms similar to those found in the initiatives of NGOs and CSR codes of MNEs. When such a shift takes place, for which some indications can be found in, for instance, very recent research that was tendered by the European Trade Union Confederation,¹⁵⁴ IFAs could very well become complementary in the sense of offering an additional regulatory mechanism to the ILO Conventions.

¹⁵⁰ Among many others: P. Fairbrother & N. Hammer, 'Global Unions: Past Efforts and Future Prospects', (2005) 60 *Industrial Relations* 3, 405-431; V. Telljohan et al, 'European and international framework agreements: new tools for transnational industrial relations', (2009) 15 *Transfer: European Review of Labour and Research* 3-4, 505-525; and C. Crouch, 'Collective Bargaining and transnational corporations in the global economy. Some Theoretical considerations', (2009) 1 *International Journal of Labour research* 2, 43-60.

¹⁵¹ K. Papadakis, 'Introduction and Overview', *op cit*, 249-258.

¹⁵² 42 references. ILO Convention 135 is concerned with the Protection and Facilities to be Afforded to Workers' Representatives in the Undertaking.

¹⁵³ 20 references. ILO Convention 155 is concerned with Occupational Safety and Health and the Working Environment.

¹⁵⁴ For the call for the tender, see <http://www.etuc.org/a/10789>.

Table 2. An overview of references in IFAs to other global initiatives

Initiative	No of references (n = 80)	IFAs
ILO Conven- tions	69	Adecco; Brunel; Danske Bank; France Telecom; Freudenberg; Group 4 Securicor; Inditex; Kelly Services; Manpower; Nampak; Olympia Flexgroup; Randstad Holding; Renault; Shoprite Checkers; Statoil; Takashima; USG People; Wilkhahn; AnglGold Ashanti; ArcelorMittal; BMW; Club Med; Daimler; Endesa; Evonik Industries; H&M; Hochtief; Indesit Company; ISS; Leoni; National Australia Group; Prym; Rheinmetall; Röchling; SCA; Schwan-Stabilo; Securitas; Volkswagen; World Color Press; Aker Solutions; Ballast Nedam; Chiquita; EADS; EDF; Elanders; ENI; Euradius; Faber-Castell; Fonterra; GEA; IKEA; Impreglio; Italcementi; Lafarge; Lukoil; Norske Skog; OTE; Portugal Telecom; PSA Peugeot; Rhodia; Royal BAM; Skanska; Staedtler; Telefónica; TEL-Telecomunicações; Umicore; Vallourec; Veidekke; Volker-Wessels
ILO 1998 Declaration	45	Accor; Citroën; Danone; Adecco; Brunel; Danske Bank; Freudenberg; Inditex; Kelly Services; Manpower; Nampak; Olympia Flexgroup; Randstad Holding; USG People; Wilkhahn; Aker Solutions; Ballast Nedam; Chiquita; EADS; EDF; Elanders; ENI; Euradius; Faber-Castell; Fonterra; GEA; IKEA; Impreglio; Italcementi; Lafarge; Lukoil; Norske Skog; OTE; Portugal Telecom; PSA Peugeot; Rhodia; Royal BAM; Skanska; Staedtler; Telefónica; TEL-Telecomunicações; Umicore; Vallourec; Veidekke; Volker-Wessels
ILO Tripartite Declara- tion	5	Impreglio; Lafarge; Royal BAM; Staedtler; Volker-Wessels
OECD Guidelines	11	Aker Solutions; Ballast Nedam; EADS; GEA; H&M; Impreglio; Inditex; ISS; Italcementi; Lafarge; WAZ
UN Global Compact	13	AnglGold Ashanti; BMW; Daimler; Danske Bank; EADS; EDF; France Telecom; H&M; Lafarge; Lukoil; PSA Peugeot; Renault; WAZ
SA8000	1	Carrefour

Source: Tables 2 and 3 annexed in K. Papadakis, *Shaping Global Industrial Relations* (ILO/Palgrave, Geneva, 2011).

V. HYBRID GLOBAL SPACE OF ILO CLSs: CONCLUSIONS

This contribution deals with the promotion of the ILO core labour standards at transnational level. These core labour standards cover the following subjects: forced labour, child labour, the right to collective bargaining and equal treatment. The underlying reason for this study is that there is a panoply of initiatives on the international and transnational level. Each of them has another function, focus or scope, but also another governance mechanism to promote the implementation of these rights. Since these initiatives promote the same rights on the same regulatory level they inevitably interact. This interaction is negative when initiatives deliberately ignore each other's existence or compete for dominance (rivalry). It is positive when the initiatives are complementary to each other or merge in a transformative configuration. The latter is the case when the two initiatives are needed to achieve the same objective. This contribution focuses on initiatives that have been undertaken on the international and transnational level. By using the doctrines of global space and hybrid structures, this contribution aims to get a better understanding of the regulatory initiatives promoting the implementation of core labour standards on international and transnational level. Since the ILO is widely recognised as the principal rule-setter when it comes to labour issues, configurations are sought with the regulatory initiatives of the ILO. Besides the initiatives of the ILO this contribution discusses the Guidelines of the OECD, the UN Global Compact programme, actions by NGOs, MNEs' unilateral codes of conduct and international framework agreements.

With regard to regulatory mechanisms the analysis in this contribution shows, within all regulatory forms, a tendency away from rule-setting command and control mechanisms towards non-hierarchical, multi-stakeholder initiatives that are characterised by ongoing deliberation, dissemination of information and practices in order to prevent infringements of the promoted labour standards (problem-solving). In the public initiatives of the ILO, the OECD and the UNGC, the emphasis lies with those problem-solving forms of regulation, which are complemented by more traditional forms of command and control. Within the ILO this is mainly so for the Conventions that set the norms regarding the labour issues, as well as for the 1998 Declaration, which translates these norms into principles. Within the OECD a command and control mechanism can be found within the dispute resolution function of the NCPs, whereas a rule-setting role can be found in the Ruggie Framework, which underpins the Global Compact programme of the UN. The tendency towards the problem-solving regulatory role is most strongly found within the initiatives of NGOs and the unilateral codes of conduct of MNCs. Within these initiatives it is clear that they do not intend to create their own standards, but to promote the implementation of the standards formulated by public organisations. In general IFAs are reticent about the mechanisms to ensure implementation and compliance. Nonetheless, some case studies show that they do apply rather complex mechanisms. These mechanisms too show a tendency towards a problem-solving role characterised by ongoing dialogue, training and the development of preventive measures tackling the core of the infringement rather than Band-Aid fixes of incidental infringements.

With regard to hybrid configurations with the ILO CLSs, the analysis in this contribution makes clear that all regulatory forms, public and private, do in general recognise the ILO as the principal rule-setter. The ILO itself, in several programmes, promotes the implementation of the CLSs, not only by addressing the member states (by its Conventions and the 1998 Declaration, including their respective compliance mechanisms), but also by addressing the MNCs via its Tripartite Declaration. The OECD Guidelines are very explicit in referring to the ILO for the interpretation of the labour standards dealt with in the Guidelines. In fact, they can be considered to form a transformative

configuration with the ILO, which offers an additional compliance mechanism with the system of 'specific instances' (dispute resolution by the NCPs) and the proactive agenda that helps enterprises to preventively identify and respond to risks. The UN Global Compact is also very explicit in that the labour principles are based on the ILO initiatives. Whereas with the OECD Guidelines it is emphasised that there is an institutional distinction. This is not the case with UN Global Compact, which not only refers to the norm-setting authority of the ILO, but also to the existence of the ILO Helpdesk for enterprises, which is part of the ILO MULTI programme that underpins the Tripartite Declaration. The UN Global Compact is also very clear about not seeking competition with the ILO; rather it offers an additional platform to promote the implementation of the labour standards, based on the logics of appropriateness.

The picture of the hybrid configurations of the private initiatives with the ILO initiatives is less homogeneous. The main reason for this is that each private initiative is designed differently and therefore based on different standards. Nonetheless, the selected initiatives in this contribution and findings of empirical research indicate that the labour standards formulated in these initiatives increasingly converge towards the ILO CLS. NGOs and IFAs increasingly use the ILO initiatives as an authoritative source of rule-setting, in particular the 1998 Declaration. The unilateral codes of conduct rely more frequently on the principles of the UN Global Compact, which are in turn explicitly based on the ILO initiatives. In the sample of twenty codes selected in this paper, only four make no reference at all and only one uses its own definitions and interpretations. Only the latter could be seriously considered as a rival to the ILO, whereas the others do not seem to intend to, but are at best unconsciously complementary to the ILO initiatives. The added value of these complementary configurations in terms of regulatory mechanisms lies in particular with the proactive approaches identifying potential risks of infringements and developing policies to prevent such infringements or repetition of manifested infringements. An important aspect here is the ongoing monitoring of compliance via well-developed audit systems, sometimes complemented with on-site inspections, and programmes that aim at capability building in general and the people involved in the implementation of the standards.

Besides the transformative configurations with the ILO initiatives, the OECD Guidelines and the UNGC form also complementary configurations with the private initiatives. Both of them are regularly recognised as one of the sources of the private initiative and both promote the implementation of the labour standards on company level via unilateral codes of conduct (CSR policies and strategies of MNCs) and IFAs. The latter is named explicitly by the UNGC as the preferred means of implementation.

The ILO itself is less explicit in referring to other regulatory forms. However, in a discussion document of 2006,¹⁵⁵ the ILO considers that effect to the Tripartite Declaration can also be given by 'building dialogue with international intergovernmental organizations and engaging with other international initiatives related to CSR, including but not limited to the International Organization for Standardization (ISO) and the Global Compact'. Also the developments in private initiatives are labelled as interesting to study with respect to the role of the ILO in these areas and future ILO activities.¹⁵⁶ From this it can be concluded that the ILO recognises other initiatives as interesting developments that, besides its own initiatives (complementary), may have a positive contribution to the further promotion and implementation of the core labour standards.

¹⁵⁵ Subcommittee on Multinational Enterprises, 'In Focus on Corporate Social Responsibility', 2006, Second item on the agenda of the 295th Session of the ILO Governing Body. GB.295/MNE/2/1, available at <http://www.ilo.org/public/english/support/lib/resource/subject/csr.htm>.

¹⁵⁶ *Ibid.*

Taking stock of the foregoing, it can be concluded that the hybrid global space of the ILO CLSs is characterised by public and private initiatives flirting and occasionally even showing forms of love. They are flirting in the sense that they form complementary configurations, which is mostly so for the regulatory mechanisms that govern the implementation of the core labour standards. They are showing forms of love in the sense that the configuration is transformative. As is the case for the OECD Guidelines, this only makes a difference in institutional settings and roles, and as such they add an implementation mechanism to the ILO regulatory mechanisms. When considered this way, instead of considering all initiatives in isolation, the promotion of labour standards on the international and transnational level is less fragmented than it appears to be. Moreover, both doctrines imply that when both types of regulatory mechanisms are applied in complementary or transformative configurations, this would play to the strengths of the initiatives and therefore to the effectiveness of those initiatives. Whether this is also the case in practice can, however, only be determined by empirical case studies. These studies have revealed and underlined that there is no 'one size fits all' or a 'silver bullet' solution for effective implementation of the labour standards. As such, a field of initiatives that interact positively is at all times to be preferred over a field that is a rival, which in the end can only have a frustrating effect.